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T H E
R E P O R T S
O F T H E
Resolutions of the C O U R T
On divers

Exceptions taken to Pleadings,
And other Matters in L A W ;

Arising (for the most part) in the Court of
COMMON PLEAS, between the 34th Year of
King CHARLES II. and the 2d Year of the Reign
of her late Majesty Queen ANNE.

A N D

Some OBSERVATIONS on several of the Precedents,
as well those which were never debated in Court, as on
many of the others.

With Two TABLES: One of the Names of the Cases,
and the other of the Matters contain'd in them.

Printed in *French* by Sir EDWARD LUTWYCHE, late
one of the Judges of the Court of *Common Pleas*; and allow'd and
approv'd of by the Lord Keeper, and by all the Reverend Judges.

Now Faithfully Translated into *English*: Together with an
Abstract of the PLEADINGS to which the said
Reports and Observations relate, with References to the
Pages in the Original.

In Two V O L U M E S.

In the S A V O R:

Printed by *Eliz. Nutt*, and *B. Gossling*, Assigns of *Edw. Sayer Esq*;
for *J. Walthoe* in the *Middle-Temple Cloysters*, and *T. Ward* in the
Inner-Temple Lane. 1718.

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A T A B L E O F T H E

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Contain'd in the Two V O L U M E S of this B O O K ;
Dispos'd and Transpos'd in such Alphabetical
Order, that the C A S E S may be easily found, as
well by the Names of the *Defendants*, as by the
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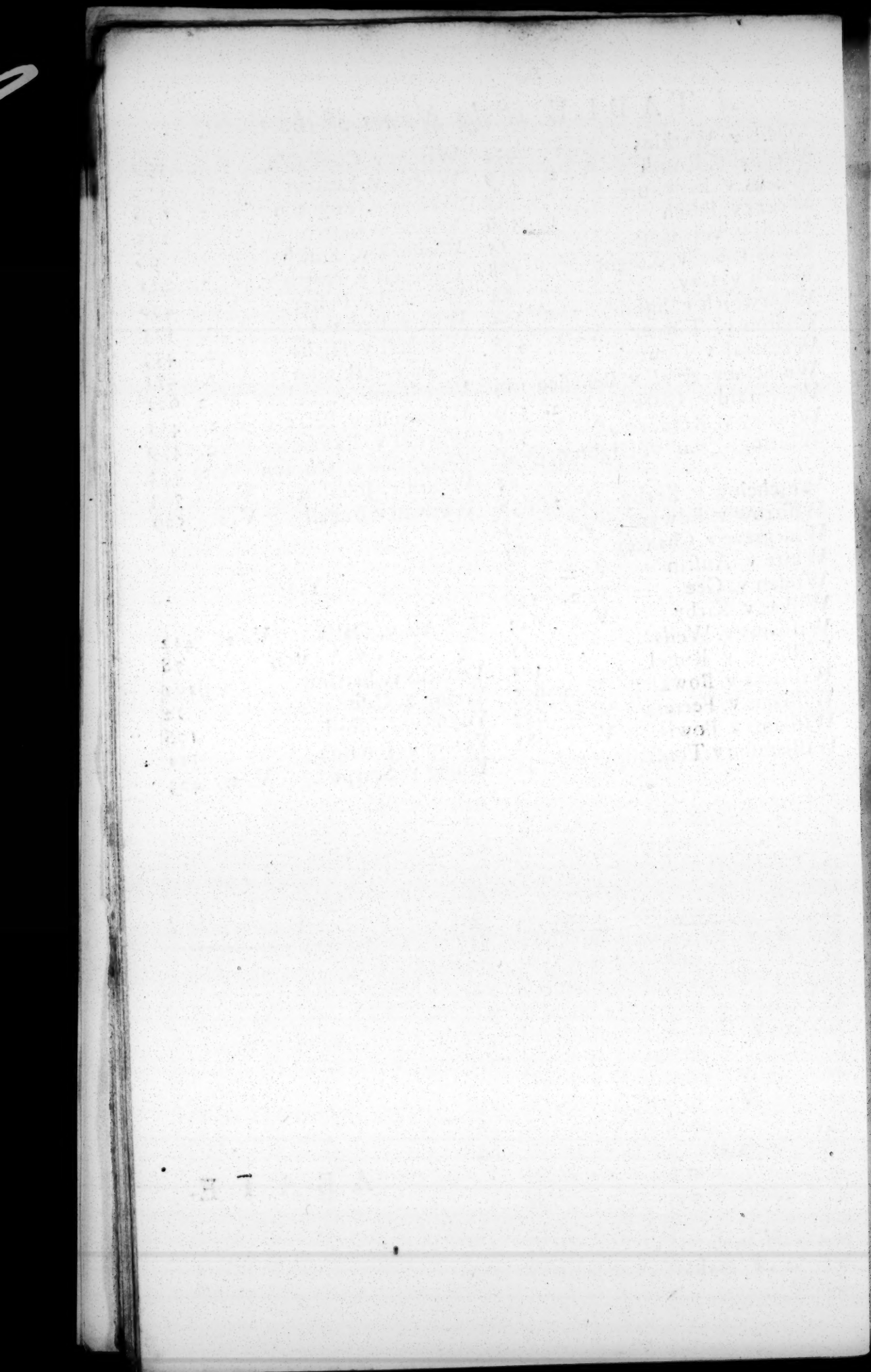
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A B A T E-



ABATEMENT.

Smalwood & al' *versus* the Bishop of
Coventry & al'.

Entred Easter 31 Eliz. Rot. 349. C. B.

IN a Quare Impedit brought by Executors to present to an Archdeaconry, they declare, that the Bishop's Predecessor was seised in gross, and collated one Luke Gilpin, and after died so seised. That the Defendant was elected Bishop, and granted the Advowson to John Becon for 21 Years, who assigned the same to the Plaintiffs Testator. That Gilpin the Incumbent died in the Life of the Testator, whereby the Archdeaconry became (and still is) vacant.

Quare Impe-
dit by Execu-
tors to pre-
sent to an
Archdeacon-
ry.

Fol. 2.

The Defendants pray Oyer of the Writ, and then plead in Abatement, That there is no Writ of Quare Impedit in the Register for an Executor for a Disturbance given the Testator in presenting to any Ecclesiastical Dignity. That the Writ supposeth the Archdeaconry vacant, so that the Plaintiffs might have had a Quare Impedit for a Disturbance given them after the Testator's Death. That the Writ contains two Disturbances, one to the Testator, and the other to the Executors: And also that the Writ supposeth that the Disturbance given the Testator in his Life, was to the Delay of the Execution of his Will, which could by no means be. Demurrer and Joinder in Demurrer.

Oyer of the
Writ.
fo. 3.

B

This

v. Cro. El. 141,
377.

fo. 4.

This Case is reported in *Savil*, 94. where it is said that one Disturbance was alledged in the Writ to be in the Life of the Testator, and another in the Time of the Executors; but it appears by the Record that there is only a Disturbance mentioned in the Life of the Testator. I have seen the Record of this Case, and there is no Judgment entred on the Roll; but there is another Action brought for the same Archdeaconry, which is entred *Pasch. 32 Eliz. Rot. 2165*. And that Case is also reported in *Savil*, 118.

1 Salk. 219.
pl. 5.

And now I will take Occasion in this first place to shew, that for avoiding of an impertinent Prolixity, no common general Demurrers shall be inserted in this Book; among which I reckon all such Demurrers in which Causes are shewn as followeth, *viz. Quod placitum est repugnans, duplex, incert' & caret forma*, or to that Effect, which (as is said in a Report that I have) the Chief Justice *Hale* call'd *a Mousetrap of the Law*, and would not allow it as a special Demurrer. And the Statute of Demurrers 27 *Eliz. cap. 5*. requires, that the Cause of Demurrer should be specially and particularly mentioned, agreeable in some measure to the Practice before that Statute, which was to debate the Matter of the Demurrer at the Bar, and sometimes at the Bench, before the Demurrer was entred; and in *Moon and Andrews Case*, *Hob. 133*. it is said by the Court, That that Statute ought to be stretcht and not shrunk. And in *Heard and Baskerville's Case*, in the same Book, it is also said by the Court, That that Statute requires that the Matter of Form should be discover'd, and not used as a secret Snare to entrap;

entrap; and that such Discovery ought not to be confused and obscure, but special; and therefore 'tis not sufficient to say, that it wants Form, but it ought to express the Point and specialty of Form, and to do this is for the Honour of the Law.

Gawen versus Surby.

fo. 5.

Trin. 35 Car. 2. Rot. 1528.

THE Plaintiff declares for an Assault, Battery, and Imprisonment, at three several times, and for taking his Goods. The Defendant, after special Empanlance, pleads Outlawry in Abatement, and produces the Capias Utlagat' under Seal. Demurrer and Joynder in Demurrer, and a Respond' ouster awarded.

Assault Battery, &c.

fo. 6.

Outlawry pleaded after special Empanlance.

It seems that the Cause of the Judgment for a Respond' ouster was, because the Defence was, defend' vim & Injur' quando, &c. and that it was a full Defence. But note, that there are multitudes of Precedents, almost throughout the whole Books of Pleadings, which are so, Co. Entr. 348. b. 349. b. Rast. 287, 333, 334, 368, 605, 663, 235. Ashton 389. Co. Entr. 118, 121, 565. Vet. Entr. 218, 223. and Clapham and Lenthal's Case, Hardres 365. is an express Authority that it is not a full Defence; but Stiles 273. is to the contrary.

fo. 7.

Walford *versus* Savil.

Mich. 36 Car. 2. Rot. 302.

Debt on
Bond against
an Admini-
stratrix.

fo. 8.

fo. 9.

DE B T on a Bond against an Administratrix. The Defendant per T. F. Attorn' suum ven. and prays Oyer of the Writ, and then pleads in Abatement, that the Writ is tested before the Letters of Administration. The Plaintiff demurs specially, 1. That the Defendant had made no Defence. 2. That the Defendant had not shewn that the Person who granted Administration had Authority, nor that the Commission of Administration belonged to him. 3. That the Defendant had not produced the Letters of Administration. And the Defendant joins in the Demurrer.

This Plea was adjudg'd to be good.

Sure Way
to make De-
fence.

And as to the first Cause of Demurrer, that was over-rul'd by reason of a great Multitude of Precedents which are so, tho' there are many other Defences; but the sure way is to make Defence in such manner, viz. Ven' & defend' Vim' & Injur', without more.

2. For the second Cause, as this Case is there is no need of shewing the Authority of the Grantor of the Letters of Administration, they being granted by the Commissary of the Bishop, *legitime constitut'*, as the Plea says, and then it is all one as if they had been granted by the Bishop himself. And the Difference is between a peculiar Jurisdiction and the Authority of the Chancellor or Commissary of a Bishop. It is also confest by the bringing of the Action against her, that she is legal Administratrix, or otherwise the Action ought to be brought against her as Executrix. *Vid. 2 Mod. Rep. 65. Daws and*

Harrison's

Harrison's Case ; where it is adjudged on Demurrer, that in a Declaration by an Administrator, it is sufficient to say, that Administration was granted to him by the Official of such a Bishop, without saying *loci illius Ordinarius*

3. And as to the third Cause of Demurrer, in *Raft. Tit. Executors, in Brief. Pl. 2.* there in an Action against an Executor, he pleads that he was made Administrator, without shewing the Letters of Administration, and Issue is taken on the dying Intestate. *Lutwyche* was of Council for the Plaintiff.

fo. 10.

Note, That on search of the Record of this Case, no Judgment is entred either for the Plaintiff or for the Defendant ; which may very well be, tho' Judgment was pronounc'd for the Plaintiff, because that at that time he was not to have Costs : But I am very well assured that the Judgment was so pronounced.

There is a Rule entred in the Court-Book in *Mich. 36 C. 2.* for Judgment *quod Def. ultorius respondeat nisi &c.* and in that Book there is no Rule to the contrary.

fo. 1667.

E *T. modo ad hunc diem scil' diem &c. ven'* A Plea in
Willielmus Robins qui per vic' N. vir- Abatement
tute brevis prædict' capt' & hic habit' in propria for Misnos-
persona sua & defend' vim & injur' Et dicit quod mer of the
ipse virtute brevis prædict' onerari non debet - quia Defendant's
dicit quod ipse non est nec intelligi potest esse eadem Christian-
persona versus quem præd' A tulit brev' suum præd' Name.
quia dicit quod ipse nominatur & vocatur Williel-
mus Robins & per idem nomen & cognomen sem-
per a tempore natiuit' suæ hucusque nominat' & vo-
cat' fuit Absq; hoc quod ipse nominatur vel voca-

tur Robertus Robins seu per idem nomen vel cognomen unquam cognit' seu vocat' fuit prout per breve prædict' ipsius A supponitur Et hoc parat' est verificare unde petit iudicium de brevi prædict' Et quod ipse de brevi illo quiet' & exonerat' sit & a Cur' hic ad largum dimittatur &c.

This Plea seems to be warranted by *Rastal*, *Tit. Brief in Misnomer*. 1 *Bro. Misnomer*. 8 *Keilway* 93. 1 *Ed. 4.* 2 & 3. 19 *H. 6.* 1. *Ashton* 1.

Præd' must be left out, or it will make the Plea ill.

Note, That in this Plea the Words *Prædict' Willielmus Robins* are left out; for if they are in such Plea, thereby the Plea would be ill, for by those Words the Defendant affirms his Name to be according to the Writ, &c. 34 *Hen. 6.* 31. 1 *Ed. 4.* 3. *Br. Estoppel* 79. and other Books are; and if it be so, then there are many bad Precedents. But for that *vid.* the Case of *Boile* and *Scarborough*, *Stiles* 440.

One and the same Person can't have 2 Christian-Names.

fo. 11.

And Note also, I have seen diverse Pleas wherein it is alledged, that the Defendant *est eadem persona versus quem Quer. tulit breve suum*, which is directly contrary to the Precedents in *Rast.* and *Ashton* before cited, and also as it seems self-contradictory; for one and the same Person can't have two Christian-Names, as it appears by the Case of *Clerk* and *Istead* in this Book, and the Authorities in that Case cited.

Must be in *Propria Persona*, unless, &c.

2. That the Plea is in *Propria Persona*, and not by Attorney; for such Plea can't be pleaded by Attorney, unless it be by special Warrant of Attorney. 3 *H. 6.* 55. *Bro. Misnomer* 55. and other Books.

Only proper when the Defendant comes in by Process.

3. That the above Plea is only proper for the Defendant when he comes in by Process but

but when the Case is otherwise, you will have Direction to plead by the Cases before cited.

4. That this Plea doth not demand Judgment of the Writ in the former Part thereof, but only in the Conclusion; for it is not formal to do it in the first Part of the Plea, unless it be for an apparent Cause in the Writ itself, as is held by Dyer and Browne, Mo. 30. &c.

Not formal to demand Judgment in the former part, unless, &c.

ET præd' W & A per J. H. Attorn' suum ven' & præd' W. quoad præd' Messuag' duo Stabul' un' Pomar' & un' Gardin' cum pertin' in C. parcell' Tenement' præd' cum pertin' in Demand' præd' specificat' unde &c. dic' quod ipse die impetrationis brevis original' præd' Marie scil' 13 die Maii 28 Car. 2. ac semper postea fuit & adhuc est solus Tenens præd' Messuag' duorum Stabul' un' Pomar' & un' Gardin' cum pertin' unde &c. ut de lib' tenement' Absq; hoc quod præd' A (the other Tenant) aliquid habet aut die impetrationis præd' brevis original' aut unquam postea aliquid habuit in prædict' un' Messuag' duob' Stabul' un' Pomar' & un' Gardin' cum pertin' unde &c. vel in aliqua parcella inde Et hoc parat' est verificare unde per' iudicium de brevi illo &c. Et ulterius quoad prædict' Messuag' duo Stabul' un' Pomar' & un' Gardin' cum pertin' unde &c. præd' W vocat inde ad Warram' Petr' Johnson sum' in Com' præd' per auxilium Cur' &c. Et quoad resid' Tenem' prædict' cum pertin' in Demand' prædict' specificat' unde &c. Idem W dicit quod prædict' M dotem suam prædict' inde versus eum habere non debet quia dicit quod præd' Rogerus quondam vir ipsius M ex cuius dotatione &c. nec die quo ipse præd' M desponsavit nec unquam postea fuit seisit' de præd' resid' Tenement' cum pertin' unde &c. de tali statu ita quod

Abatement by Plea of several Tenancy in a Writ of Dower.

eandem M inde dotasse potuit Et de hoc pon' se super priam' & prædict' M similit' &c.

fo. 12.

And the other Tenant, as to five Acres of Land (the Residue of the said Tenements) in Demand, pleads several Tenancy in himself, and vouches another Person, and pleads the like Plea to the Residue as the other Tenant had done. *Quære* if the Plea in this Case ought to conclude Judgment of the Writ, and for this *vide* Rast. 364, 365. Brook, Tit. Several Tenancy, throughout.

Tenant
ought to
plead over
or vouch.

Note, That the Tenant ought also to plead over in Bar or vouch, as it is here, as appears by the Books above.

Marshall *versus* Burnet.

Hill. 1 & 2 Jac. 2. Reg. Rot. 1244.

Action on
the Case on
an Assumpsit a-
gainst an Exe-
cutrix.

fo. 13.

Plea that the
Testator was
alive after the
Time of the
Writ purcha-
sed *apud*. &c.

fo. 14.

The Venue
of a transito-
ry Thing can-
not be drawn
from the Ve-
nue in the
Declaration.

IN an Action on the Case on an Assumpsit against an Executrix on a Quantum meruit for Barley sold, and an Indebitat' assumpsit for Barley sold, the Defendant craves Oyer of the Writ, and pleads that the Testator was alive after the time of the Writ purchased.

Judgment was given in this Case, *quod* Def. respondeat ouster for a Fault in the Plea; which was, that the Promises being by the Declaration suppos'd to be made at *Bradford*, the Defendant hath pleaded that *George Burnet* her Testator was alive after the Original, *viz. apud O. præd'* which by the Writ is only alledg'd to be the Place of the Defendant's Abode, and by that means the Defendant endeavours to draw the Venue of a transitory thing from the Venue alledg'd in the Declaration, which hath been oftentimes adjudg'd to be Error, and a Place

Abatement.

9

Place ought to have been alledg'd where the Defendant's Testator was alive, as is held in *Bro. Lieu. 9. 6 H. 7. 5, 6. Dier 17. a.* and then she ought to pursue the Declaration.

A Place ought to be alledged where the Testator was alive.

Note, There are some Precedents in which after the Death of a Man is alledg'd, his Life is mentioned of the other side without mentioning any Place where he is alive; but if the Cases before-cited are Law, they are no good Precedents.

Note also, In this Case the Death of the Defendant's Testator is not traversed, nor ought to be traversed, because the Writ and Count are but Supposals of his Death; but when the Death of a Man is positively alledg'd on one side, and the Life on the other side, there the Death ought to be traversed.

Where the Death of a Man ought to be travers'd. fo. 15.

6 H. 7. 5, 6. 39 H. 6. 49. 19 H. 6. 11, 12. 1 Vent. 213. Fortescue, and Hol's Case. But nevertheless, there are some Precedents without any Traverse; but according to those Books they ought to be made, and if they are not, the Pleas will be ill on a special Demurrer at the least.

Quære, If in this Case the Plea ought not to have been that the Defendant's Testator was alive, *die Impetrationis brevis Originalis, &c.* as it is in *Herne's Pleader*, p. 1. in Case of an Action of Debt against the Heir, where he pleads in Abatement that the Ancestor was alive *die Impetrationis brevis, &c.* which is the only Precedent in this Case, or tending to the Case here that I can find in all my Books: The Allegation of the Life of the Testator after the Original being only argumentative, that he was not dead at the Time of the Writ purchased, and a Plea in Abate-

Plea in Abatement ought to be pleaded strictly and with precise Exactness.

Papworth *versus* Stacy.

Trin. 2 Jac. Reg. Rot. 2076.

Debt on Bond against an Executrix. fo. 16.

IN Debt on Bond against an Executrix. The Defendant craves Oyer of the Writ, and pleads that her Testator was alive at the Time of the Original purchased.

No Advantage to be taken of the Omission of *hoc paratus est verificare* on a general Demurrer.

An Exception was taken to this Plea that it was not averred, but that *Et hoc paratus est verificare* was entirely omitted; but the Court held that that was only Matter of Form, and no Advantage could be taken thereof on a general Demurrer; and so is Savil 85. and Morley and Vivian's Case, Pasch. 5 W. and M. adjudged. But Judgment was given *quod breve cassetur*; for it appeared that the Writ bore Date before the Money became due.

Bradley *versus* Glynne.

fo. 17.

Trin. 2 Jac. 2. Reg. Rot. 341.

Debt on Bond.

Excommunicat' pleaded. fo. 18.

fo. 19.

IN Debt on Bond the Defendant per Johannem Oliver Attorn' suum ven' & defend' Vim & Injur' quando, &c. Et dicit quod ipse ad breve respond' non debet, for that the Plaintiff is excommunicated by the Delegates, and sets forth the Writ of Plures Excomm' capiend' with Non omittas, &c. according to the Form of the Statute, with proper Averments, and produces the said Writ of Excomm' capiend' in Court. Demurrer and Joinder in Demurrer.

Judg.

Abatement.

II

Judgment *quod Def. respondeat ouster*, because no Certificate of the Delegates was produced; and also because the Plea concluded ill, for it ought to be that *Loquela remaneat sine die quousque*, &c. Co. Litt. § 201.

Also if the Profert of the Writ of *Excomm'* had been sufficient without a Certificate, yet it ought to have been *sub pede sigilli*, the Writ being out of another Court. Co. Litt. 128. a and b, and *vide* 3 Levinz 333, 334. Judgment *quod respond' ouster*.

Little & Ux. *versus* Plant.

fo. 20.

Mich. 2 Jac. 2. Reg. Rot. 767.

IN Debt on Bond against an Administratrix she pleads that she is Administratrix *durante minori etate*. The Plaintiff demurs specially, and the Defendant joins in the Demurrer. Debt on Bond against an Administratrix.

Judgment that the Defendant *respond' ouster*, for want of an Averment of her Plea by a *Hoc parat' est verificare*, &c. which is the Cause of Demurrer. fo. 21.

Barcelot *versus* Burton.

fo. 22.

Pasch. 3 Jac. 2. Reg. Rot. 475.

IN an Indebitat' *assumpsit* and Quantum meruit for Goods sold, the Defendant pleads Covert Baron. Replication per Estoppel by Imparlance. Assumpsit for Goods sold. fo. 23.

Judgment *quod Def. respond' ouster*, because the Plea was only in Abatement, and was not pleadable after an Imparlance. *Vide* 2 Keble 134. Perin and Corb's Case. Covert Baron not pleadable after Imparlance. fo. 14.

Naers

Naers *versus* Comit' de Huntington & al.

Mich. 4 Jac. 2. Reg. Rot. 313.

Scire facias
on a Recogni-
zance.

fo. 25.

fo. 26.

THE Plaintiff brought a Scire facias on a Recognizance, after two Nichils retorn'd. The Defendant appeared, and pleaded in Abatement that there were but 14 Days between the Teste and the Return of the Scire facias. Demurrer and Joinder in Demurrer.

As to the Plea in Abatement, that there were but 14 Days between the Teste and Return of the Scire facias, 'twas answered and resolved, that 'twas good by the Stat. 16 Car. 1. Cap. 16. Par. 8.

Then an Exception was taken, that the Scire facias concluded with these Words, *juxta formam Recuperationis prædict'* whereas it shou'd be *juxta formam Recognitionis præd'* So the Writ was brought and seen by the Order of the Court, and it being *Quare, &c. in forma præd' recognit' secund' formam Recuperat' præd'* 'twas ruled that the first part was good, and the latter part repugnant and void; and therefore Respond' ouster was awarded. Sir John Holt, then the King's Serjeant, and now Chief Justice of the King's Bench, of Council with the Plaintiff.

Where
words which
are repug-
nant shall be
rejected.

1 Salk. 324,
325.

Young *versus* Case.

fo. 27.
Indebitat' Af-
sumpsit against
an Executrix.

fo. 29.

Who pleads
she is Admi-
nistratrix.

Trin. 2 W. & M. Regis & Reginae.

IN an Indebitat' Assumpsit, &c. for Coals sold, brought against the Defendant as Executrix; she pleads that she is Administratrix, and that

that Administration was granted to her by the Dean, &c. of Canterbury, to whom it belong'd by reason of the Suspension of the Archbishop. The Plaintiff demurs, because that the Defendant had pleaded Administration was committed to her, and had not produc'd the Letters of Administration. And 2. That the Plea was insufficient in Substance.

Serjeant Birch for the Plaintiff took these Exceptions to the Plea.

fo. 30.

1. That it was not alledged in what Diocess the Party died intestate, or in what Diocess the Intestate had *bona notabilia*; so that it might appear that he died or had *bona notabilia* in the Province of Canterbury: For if not, then the Administration was not well granted to the Defendant.

Ought to set forth in what Diocess the Party died, and in what Diocess he had *Bona notabilia*, &c.

2. That notwithstanding what is alledged in the Plea, perhaps the Defendant had administred as Executrix before the Administration granted, and then the taking of Administration after would not purge the Tort, according to *Read's Case*, Co. 5. 33, b. *Stiles* 384. *Ashby v. Childs*. And the Court awarded *Respond' ouster* chiefly for the first Exception.

As to the second Exception, *Quære* if it ought not to be alledged in the Replication that the Defendant had administred as Executrix before the Administration was granted to her; for so it is in *Keble and Osbaston's Case*, Hob. 49. and in *Raft. Tit. Executors*, N. 2. and the Book of Entries called *Placita generalia & specialia*, p. 2. and 12. the Pleading is as here.

1. Salk. 197. Pl. 8.

Tho' it be said, Cui &c. pertinuit.

Note, That it said that the granting of Administration belonged to the Dean and Chapter.

v. 1. Salk. 40, 41.

Bowler *versus* Spathurst.

fo. 31.

Pasch. 8 W. 3. Reg.

A Declaration on a Writ of Privilege by an Attorney of C. B.

fo. 32.

fo. 33.

Abatement by another Action depending. Repl

fo. 34.

THE Plaintiff declares, 1. On an Assumpsit for Money expended about the Defendant's Affairs, and for Money which he deserved for his Labour in soliciting thereof, avers, that he expended 3 l. 10 s. and that he deserved for his Labour 12 l. 2. On an Indebitat' assumpsit for Money laid out by the Plaintiff for the Defendant. 3. On an Assumpsit to pay the Plaintiff 10 Guineas for his said Labour and Diligence. 4. On an Indebitat' assumpsit for 10 l. expended, and for his Labour in and about other things as the Defendant's Solicitor, and lays a special Request.

The Defendant pleads another Action depending on a Writ directed to the Sheriff of Wilts, and avers that it is the same Cause of Action. The Plaintiff replies and confesses that there was such Writ, but says there was nothing done thereupon; that another Writ of the same Date was sued out, directed to the Sheriff of Southampton, to which the Defendant appeared, &c. Demurrer and Joinder in Demurrer.

The whole Court was of Opinion that the Replication was ill, because the Action is laid in *Middlesex*, and the Plaintiff by his Replication hath confessed that the Writ to which the Defendant appeared, and on which the Plaintiff declared was directed to the Sheriff of *Southampton*; which cannot be, for the Action is laid in *Middlesex*; so that the now Declaration is supposed to be founded on a Writ directed *Vic' Midd'* and not to the Sheriff of *Southampton*: And then by the Allegation that the Appearance of the Defendant was on a Writ directed to the Sheriff

Sheriff of Southampton, he hath of his own shewing falsified his Writ. Judgment was given that the Writ should abate. Judgment that the Writ shall abate.

Wells versus Williams.

Mich. 9 W. 3. Rot. 387.

IN Debt on Bond brought by the Plaintiff as Executrix of S. W. and Defendant per A. B. Attorn' suum Ven' & defend' Vim & Injur' quando, &c. and pleads in Abatement that the Testator was an Alien. The Plaintiff replies, that her Testator at the time of making the Bond, and ever after, to his Death, lived in England by the King's Licence and Protection. Demurrer and Joinder in Demurrer. Plea in Abatement that the Testator was an Alien. Replicat' per Licence.

Judgment quod respondeat ouster, because it doth not appear but that the Testator might come into England in the Time of Peace, and had always after quietly continued, which by the C. J. amounts to a Licence. 2. If he had come here in the Time of War, and had continued here without Disturbance, it should be intended that he came here with Licence. Vide Mo. 839. Dy. 2. Benl. 10. 1 Salk. 2. pl. 5.

Note, That the Plea is Actio non, &c. and to the Replication prays Judgment quod Def. respond' ouster. See for that Rast. in Ejectment' 7. Trespass in an Alien, 1. Ash. 11. in the Assize of Bagot 9 E. 4. 7. The Plaintiff demands Judgment of the Writ; but Litt. § 198. says, that the Defendant may demand Judgment, respondere debeat, &c. What shall be intended a Licence. fo. 35.

Shovel *versus* Evans.

Mich. 9 W. 3. Reg. Rot. 311.

Indebitat' Assumpsit against two Defendants, one is outlawed. **I**N an Indebitat' assumpsit against two Defendants one is outlawed, the other pleads that the Defendant who is outlawed is misnamed. Demurrer and Joinder in Demurrer.

fo. 36. Judgment quod respond' ouster; for one shall not plead the Misnomer of his Companion, *Br. Misnomer 10. vid. 14 H. 6. 3. and Br. Misnomer 79.* Lutwyche was of Counsel with the Plaintiff.

Moseley *versus* Coldwell.

Mich. 10 W. 3. Reg. Rot. 255. in C. B.

Formedon in Descender on a Covenant to stand seised. **I**N a Formedon in Descender on a Covenant to stand seised, the Defendant pleads Nontenure to part, and shews who is Tenant of that part; and as to the Residue that the Plaintiff entred. The Plaintiff replies to the Nontenure, that the Defendant was Tenant, &c. and Issue thereupon and demurs to the Residue.

It was objected, that this latter Plea of Entry, &c. was ill for these Reasons:

Non Tenure pleaded to part, and Entry into the Residue, is ill.

1. Because it was inconsistent with the former Plea of Nontenure as to part, for thereby he confesses himself by Implication to be Tenant of that part whereunto he hath not pleaded Nontenure; but by his latter Plea he contradicts it. For if the Demandant had entred into any part, and was in Possession thereof, he could not be Tenant of it. And for another Reason

Reason also the Pleas are repugnant the one to the other; for by the former he would have the Writ abatable in part, and by the latter he saith 'tis *de facto* wholly abated by the Entry, as indeed by Law it is; for if the Demandant enters into any Part, &c. he falsifies his whole Writ; and so are 26 H. 6. 81. 5 H. 7. 7. & 5 E. 4. 116, 117.

A second Reason that the Plea was ill, was because no Time is mentioned when the Demandant entred; and it might be either before the Writ, and then it ought to be so pleaded; but if pending the Writ, and before any Continuance, then it ought to be pleaded *pendente brevi*; and if after the last Continuance, then it ought to be pleaded accordingly: And therefore it is taken for a Rule by *Jenor* Prothonotary, *Br. Brief* 2. and it is the common Practice in the Books. *Vid.* 21 H. 6. 50. a. *Rast.* in *venire placito* 1 & 381. *Ashton* 9. Pl. 30. *Lutwyche* for the Demandant, *Girdler* for the Tenant.

fo. 39.
How to
plead an Entry.

Draycote *versus* Curzon.

Hill. 11 W. 3. Rot. 512.

IN Dower the Tenant pleaded, Quod ipse im-
placitavit prædict' Janam (the Demandant)
per nomen Janæ Draycote tunc nup' de L.
&c. de placito debiti sup' demand' 240 lib'
prædictaq; Jana pro eo quod non ven' &c. in
exigend' posita fuit; and afterwards scil' &c.
debito Juris modo waviata &c. and so concludes
in Abatement. To this the Demandant replies, That
die impetrat' brevis super quo &c. she was co-
morant at another Place; Absque hoc, that she

Dower.

was comorant at I. &c. To this Replication the Tenant demurs, and the Demandant joins in the Demurrer.

fo. 40.
Outlawry
not to be re-
vers'd by Plea
in a Collate-
ral Action.

It was insisted by the Tenant's Council, that admitting the Outlawry was erroneous, yet it was not void, or voidable, but by a Writ of Error, or an Averment on the Outlawry-Roll, by the Party who ought to come in in Custody, and not by the Plea in this Collateral Action of Dower, according to 2 *Instit.* 670. Whereupon the Opinion of the Court was, that the Demandant's Replication was not good, because the Matter thereof was not pleadable in this Collateral Action, and that the Outlawry will be in Force until it be revers'd in a proper manner.

Where the
word *prædict'*
is a sufficient
Averment of
the Identity.

But then, it was objected by the Demandant's Council, that the Tenant's Plea was ill, because he said the Demandant in *Trinity Term, &c.* was impleaded by the Name *Jane Draycote tunc nup' de Lassoe, &c.* whereas it should be *nup' de Lassoe*, without the Word *tunc*: But that Exception was not allowed. 2. It was objected that there is no Averment in the Tenant's Plea, that *Jane Draycote* in the Outlawry, and the now Demandant, are the same Person: Whereunto it was answered, and so resolved by the Court, that *prædicta Jana* was a sufficient Averment of the Identity of the Person, especially the Words

Outlawry
in the same
Court, need
not be plead-
ed *sub pede si-*
gilli.

per nomen, &c. being added. 3. It was excepted, that the Tenant ought to produce the Outlawry *sub pede sigilli*, it being a dilatory Plea in Disability of the Person: To which it was answered, and so resolved by Court, that the Record of the Outlawry being in this Court, there is no need of pleading

ing it *sub pede sigilli*; otherwise, if it had been pleaded in another Court; and thereupon the Writ was quash'd by the Judgment of the Court. Serjeant *Byrch* (afterwards the late Queen's Serjeant) for the Demandant, and Serjeant *Girdler* for the Tenant.

Note, That in the Addition of the Estate, Degree or Mystery, by the Stat. 1 *H. 5. cap. 5.* it ought to be alledged as the Tenant or Defendant in the Action was at the Time of the Writ purchased, and not with a *nuper*, as *nup' ar' &c.* because Men are frequently altering the Place of their Habitation.

How the Addition, &c. ought to be alledged.

Wallis *versus* Savil, Naylor, & Stacy.

Hill. 13 W. 3. Rot. 1506. C. B.

THE Plaintiff, in an Action of Trespass for taking his Cattle, declared, That the Defendants such a day vi & armis averia ipsius (the Plaintiff) viz. &c. cæper' fugaver' & abduxer' The Defendants, as to Part, plead not guilty; and to the Residue, that the Plaintiff such a Term, &c. implacitasset eosdem Savil & Stacy & quosdam Thomam Spence & Thomam Middleton narrando &c. (but nothing is said as to the Defendant Naylor) and that the said Suit adhuc pender unde pet' judic' si actio &c.

Trespass.

fo. 41.
fo. 42.

Judgment was given against them on this Plea, *quod Quer' recuper' damp' sua*, and not *quod Def' respond' ouster*; because that the Plea begins and also concludes in Barr. 1 *Sid.* 189. *Burden and Ferrer's Case.* 3 *Cro.* 202. *Isan and Pager's Case.* 1 *Mod. Rep.* 239. *Justice and White's Case*, that Judgment may be so, when

How Judgment shall be given, when Matter in Abatement only is pleaded in Bar.

Matter in Abatement only (as here) is pleaded in Bar. *Lutwyche* for the Plaintiff.

fo. 43.

Wentworth *versus* Squib.

Pasch. 13 W. 3. C. B. Hill. 12. Lib. Rot. 677.
Pasch. 13. Dem. Rot. 495.

Debt on
Bond, &c.

IN an Action of Debt on a Bond, and also on a Judgment, the Defendant, after Impar lance *salvis sibi omnibus & omnimod' except' & advantag' tam ad jurisdict' cur' quam ad breve & narrationem*, pleads the Privilege of the Exchequer in Abatement. Demurrer and Joinder in Demurrer.

Privilege of
Exchequer af-
ter Impar-
lance with a
saving of all
Exceptions to
the Jurisdi-
ction of the
Court, ill.

fo. 46.
Aliter, had
it been *salvis*
omnibus ad-
vantagiis qui-
buscunq;

Privilege of
the Excheq. al-
low'd on pro-
ducing the
Red Book.

The Exception taken to this Plea, was, that an Impar lance with a saving of all Ex ceptions to the Jurisdiction of the Court was never seen, and at most could be but an Im par lance *salvis exception' tam ad breve quam ad narrationem*; and on such an Impar lance this Plea could not be pleaded (For that *vide* 26 H. 6. 7. and 9 E. 4. 57.) But 'twas agreed the Plea would have been good, had the Im par lance been *salvis omnibus advantagiis quibus- cunq;* as in *Clapham's Case*, *Hardres* 365.

It was said by the Court, that such an Im par lance as this ought not to have been granted by a Prothonotary, and thereupon they awarded a *Respond' ouster*, but resolved that the Plea had been good, had the Im par lance been as in *Clapham's Case* before: And it was said by *Powell* Justice, there was no need of pleading the Privilege of the Exche quer, but that it was to be allowed on pro ducing the *Red Book* by one of the Barons. *Goodwin* for the Defendant, *Lutwyche* for the Plaintiff.

A C.

A C C O U N T.

Andrews & Anna Ux' ejus, & Arthurus
Cocket *versus* Arthur' Robsert.

THE Plaintiffs declare, that the Defendant
20 Aug. 10 Eliz. was the Receiver of the
Money of the said Cocket and Ann dum sola,
viz. by the hands of John Wase, 100 l. to render
an Account when required; præd' tamen &c.
The Defendant pleads he never was the Receiver of
the said 100 l. or any Part thereof, by the hands of
the said John Wase, to render an Account, &c.
Upon this they were at Issue, and 'twas found by
Special Verdict, that 10 Aug. 10 Eliz. one Charles
Williams gave the said 100 l. for the Relief of the
said Cocket and Ann, which he delivered to the
said John Wase, to the intent he should deliver the
same to the Defendant for the Relief of the said
Cocket and Ann; and that the said John Wase
eodem 10 Augusti 10 Eliz. did deliver the said
100 l. to the Defendant for the Relief of the said
Cocket and Ann according to the said intent.
Et si super totam materiam, &c. Whereupon
the Court gave Judgment, quod computet; and
the Defendant was afterwards taken and brought to
the Bar by virtue of a Capias ad computand'
and committed to the Fleet quousque, &c. and
then the Court assigned him Auditors to hear his
Account; Et super hoc he found Mainpernors in
200 l. to enter into Account before them, and to fi-
nish it, &c. and to appear in Court de die in di-
em until Judgment was given thereupon, and to
satisfie all the Arrearages which by the Court he
should be adjudged to satisfie, or to render his Body

fo. 47.
Account by
Baron and
Feme and a
third Person,
against a Re-
ceiver of the
Money of the
Feme and 3d
Person.

Special Ver-
dict.

Note, The
precise Time
was Parcel of
the Issue.
fo. 50.

to Prison quousque &c. And hereupon he enter'd into Account, and alledged, that he had maintained the said Ann dum sola, and the said Cocket, per spatium octo annor' apud &c. and had expended the said 100 l. for the Relief of the said Ann and Cocket, and so prayed to be discharged; and upon this they were at Issue.

fo. 51.

And now the first Day of this Hillary Term the Jury appeared at the Bar, and it appeared on the Evidence that he had found one of them with Meat and Drink, but for a less Time than eight Years, and for that he had expended the said 100 l. and on that the Court moved the Jury to find a Special Verdict, for they were in doubt if it should be found against the Defendant or no; whereupon they found the whole matter Specially, and the Jury went to their Inn, and then came back and said precisely, that the Defendant *non educavit relevavit nec nutritivit ipsos* Arthur' Cocket & Annam per spatium octo annor' as the Defendant had alledged, and found entirely against the Defendant, notwithstanding the Motion of the Court to give a special Verdict. And afterwards the Defendant's Council prayed he might be committed in Discharge of his Bail. And the Court commanded Judgment to be entred, and asked the Plaintiffs if they would have his Body; and the Plaintiffs pray'd an *Elegit*; and the Court said they might have it if they would refuse the Body, and gave them Time to advise; and afterwards, the last Day of the Term, the Plaintiffs were content to take his Body; and the Court said, that they ought to pray the Body, which they did, whereupon the Defendant was committed to the Fleet in Execution. A

Writ

Writ of Error was afterwards brought in the King's Bench, and the former Judgment affirmed. Ex M. S. of Justiciary Warburton in my Hands.

The Proceedings on the Writ of Error are reported in Cro. El. 82.

Dighton & al' versus Whiting.

fo. 51.

Hill. 6 W. 3. Rot. 358, 359. C. B.

Dighton & al' mercat' & M. King, executrix testamenti N. King mercat' brought an Action of Account, and declared against the Defendant as Bayliff, charging him with several Parcels of Goods which he had received ad merchandizand' In Barr whereof, the Defendant pleaded a conditional Submission by the Testator and the other Plaintiffs to two Arbitrators, with a Submission over to an Umpire, which was likewise conditional with an ita quod &c. and said, the Arbitrators made no Award, but that the Umpire such a Day, &c. awarded that all Suits, &c. should cease, &c. that Dighton and the others, or some of them, &c. should pay the Defendant 30 l. and should receive their Goods left by the Defendant in the Hands of one Warren for their Use; and that if the said N. King should infra quatuor menses after the Date of the Award make Oath, that the two Tuns Freight dimiss' fuit per præd' N. King at 16 l. per Tun; and if the Defendant within ten Days after the said four Months should make Oath quod ipse capit the two Tuns Freight at 10 l. & non amplius, then the said Dighton and the others, or some of them should pay the Defendant 12 l. more; and lastly, that the Parties should give mutual Releases. To which Plea the Plaintiffs demurred, and the Defendant joined in Demurrer.

Account by the Executrix of a Joint-Merchant deceased and the surviving Joint-Merchant, against the Defendant as Bayliff.

fo. 56.

In what Cases an Award is no Bar.

How to be pleaded when for Payment of Money and the Day is past.

How when the Day is not past.

How when it is to do a Collateral Act.

Treby Chief Justice pronounced Judgment for the Plaintiffs without giving any Reason; and therefore it will be more necessary to report what was said in the Argument of the Case for the Plaintiff, than in other Cases wherein there are particular Resolutions. It was said by the Plaintiff's Council, that an Award can't be pleaded in Bar of an Action, unless it appears that present Satisfaction of the Plaintiff's Demand was given by the Award it self, or one that was executed after and before the Action brought, or for which the Plaintiff might have an Action. The Books go on these Differences; If the Award be for Payment of Money, and the Day of Payment be past, the actual Payment ought to be pleaded, or a Tender and Refusal, which is a Payment in Law. If the Day of Payment be not past, there it is sufficient to plead the Award it self, because the Plaintiff hath Remedy for his Money by an Action of Debt on the Award. But if the Award be to do a Collateral Act, as to seal a Bond to the Plaintiff, or any such thing; there, tho' the Day be not past, yet the pleading of the Award shall not bar the Plaintiff, if the Defendant doth not plead also that he hath performed the thing awarded, unless he assigns a Fault in the Plaintiff as a Reason why it was not done. And to prove these Differences, the Cases in *Roll's 1. Abridg. Tit. Arbitrament*, 266, 267. were cited. There are some Books which say, that if the Defendant pleads that he was *touts temps prist*, &c. and tenders the thing in Court, that is sufficient; but there are more to the contrary, as appears in *Roll's Abridg.* 266, 267. 7 H. 4. 30. b. 19 H. 6. 6 & 38. 22 H. 6. 52. 45 E. 3. 16. a.

3 Cro. 66. *Hare and George's Case.* 1 Keb. 848.
Lynch and Dacy's Case.

It was objected, that by the Award all Suits, &c. are to cease, &c. and that that is a good Award in it self: But to that it was answered by the Plaintiff's Council, That true it is, such Award is good to this Purpose, viz. That if any of the Parties does to the contrary of such an Award, the Party so doing contrary forfeits his Bond for the Performance of the Award, if there be any; but if there be none, there is no Remedy by Law for the other Party. But such a thing is not pleadable in Bar of an Action, because it is a thing always executory and at the Will of the Parties, and no means by Law to enforce the Performance of it. And therefore if an Award be made that a Man shall be quit of a Trespass, if he will swear that he was not Guilty of the Trespass, and he doth accordingly, yet that is not pleadable in Bar of an Action for the Trespass, 46 E. 3. 17. b. There is no Difference between an Accord and an Award, where there is no means to compel the Execution of the Award; but an Accord that the Parties shall be quit the one against the other, can't be pleaded in Bar of an Action (*Roll, Tit. Accord*) because there is no Satisfaction, and as it is adjudg'd in *David and Okeham's Case*, *Roll. Tit. Accord*, Numb. 8. that is as strong as an Award that all Suits and Controversies shall cease, &c. or as an Award that the Parties shall give general Releases the one to the other.

An Award that all Suits shall cease, to what purpose good.

fo. 57.

It was objected that the Award is, that the Plaintiffs shall take their Goods which were delivered to the Hands of one *Warren* That one Party shall take his Goods deliver'd by the other to a third Person.

in *Maryland* to the Use of the Plaintiffs, and that that is a sufficient Award of it self: But so that it was answered by the Plaintiff's Council, that the Award was not good in that Point, because it could not be presumed that *Warren* would deliver them without the Defendant's Order; so that the Execution thereof depended on the mere good Will of the Defendant; and also the Plaintiffs have not by Law any Remedy to compel the Delivery of them, or to get Satisfaction for the Nondelivery thereof. And it is also absurd and unreasonable to award the Plaintiffs to take back their Goods in Specie, which were delivered to the Defendants to merchandize and make Profit of. And for that *vid. 9 E. 4. 19. a.* as to Accord; and that the Law is so in the Case of an Award, *vid. 12 H. 7. 14 & 15.*

Where an Award that is void in Part, shall be void in the Whole.

That the Award touching the Payment by some of the Plaintiffs to the Defendant for the two Tuns Freight, is apparently absurd and unreasonable, and so in that Particular void, *Stiles 365.* But that which is a full Answer to this Plea, admitting that any part of the Award was good, is, that by the Intent of the Umpire, and in Judgment of Law, all the things awarded to be done to the Plaintiffs, are but one entire and compleat Satisfaction of the Plaintiff's Demand by this Suit, and therefore all ought to be good and performed. And so is *Rolls, Tit. Accord 129. Numb. 13.* as to Accord, and *22 H. 6. 52.* as to Arbitrament; and the rather in this Case, because the Submission is Conditional, with an *Ita quod, &c.* and therefore if it be void in Part, it is void in the Whole. And for that *vid. 3 Cro. 838. Risdén and Inglet's Case.*

Case. 2 Cro. 200. Middleton and Week's Case. 354. Omesdale and Cook's Case. 584. Winch and Crane's Case. Dyer 216. b. 240. a & b. 2 Brownl. 310. 1 Keb. 754. Dudley and Colston. And vid. for that a good Case lately adjudged between Cockson and Ogle, after in this Book. Lutwyche for the Plaintiffs.

Pierce versus Clarke.

Mich. 11 W. 3. Rot. 787. C. B.

THE Plaintiff declares against the Defendant as Bayliff, for 132 Bushels of Wheat, received by him ad merchandizand' &c. To which the Defendant pleads plene computavit, and Issue being joined thereon, the Plaintiff had a Verdict and Judgment quod computet. Then the Defendant in his Account before the Auditors says, he received 120 Bushels and no more, and shews how he had dispos'd of them, and demands his Allowances in English. To this the Plaintiff demurs and the Defendant joins in Demurrer.

Judgment by the Opinion of the whole Court was given, that the Plaintiff should recover according to that for which he had declared: 1. Because the Defendant had given in his Account in English. And for that see Cok. Entr. 47. a. Winch. 2 & 3. Brownl. Par. 1. 124. Brownl. Latin redivivus 124. Rast. Account 5. 6, 2. three Presidents which are all in Latin; and so they ought to be, as it is adjudged in Blackbourne and Sale's Case, Mich. 11 Fa. Rot. 709. C. B.

The second Reason of the Judgment in this Case was, for that the Defendant by his Plea of plene computavit had confessed the Receipt of but for Part.

fo. 58.
Account against a Bayliff.

fo. 63.
Judgment for the Plaintiff, 1. Because the Account was in English.

2. For that he had by his Plea confess'd the Whole, and accounts of but for Part.

of all the 132 Bushels of Wheat, and in his Account before the Auditors he had made Mention but of an 120 Bushels. And that the Judgment ought to be so as before is mentioned, these Cases were cited, *viz.* 3 Cro. 806. *Williams* and *White's Case*. *Fitzb. Account*, 109. *Respond.* 29. But note, That in all those Cases the Defendant refused the Account. *Quære*, If that makes any Difference of the Case here, wherein he gives an imperfect Account. *Quære*, If the Defendant had taken the Value of the Goods by Protestation, if a Writ of Inquiry of the Value ought to have issued. And for that see *Bowles* and *Broadhead's Case*, *Alleyn* 88.

Note, That the Judgment in this Case ought to be, that the Plaintiff should recover according to that for which he had declared, and not *quod recuperet valorem*, *viz.* 25 *l.* which is the Value mentioned in the Declaration here; for for that Fault the Judgment in *Williams* and *White's Case* before cited, was reversed. *Lutwyche* for the Plaintiff.

ACTION on the CASE.

Bradley *versus* Gill.

Hill. 3, 4 Fac. 2. Rot. 1890. C. B.

THE Plaintiff declares quod cum such a Day he was, and yet is, seised in Fee of a Messuage cum pertin' &c. Cumque the Defendant præd' die & semper postea usque diem impenetrationis brevis &c. occupavit Messuag' adjoining to the Plaintiff's House. The Defendant designing wholly to deprive him of the Benefit of his House, did within his (the Defendant's) House erect a Smith's Shop, &c. per quod &c. The Defendant pleads, that he hath used the Trade of a Smith in, &c. for the space of twenty Years (he being brought up an Apprentice therein) that the Plaintiff advised him to dwell in the House and use his Trade there; and thereupon he came to the House and dwelt there, and in a convenient Room thereof did erect a Smith's Forge, with a Traverse that he did de novo erect a Smith's Forge otherwise than as aforesaid. Demurrer and Joinder in Demurrer.

Case for a Nuisance by erecting a Smith's Shop.

The Opinion of the Court was, that the Action lies. And for that vide Co. 9. 57. Aldred's Case. Hutton 135. Palmer 536. Roll's tit. Action sur le Case 89. Johnson and Gills Case. It was also held, that the Plea did not answer the Declaration, and that the Traverse was idle. But the Defendant by Consent had leave to amend his Plea.

fo. 71. Adjudg'd that the Action lies.

Benson

Benson *versus* Musgrave.

Trin. 2 Jac. 2. Rot. 1652.

Action on
the Case a-
gainst a She-
riff for an E-
scape on mean
Process.

fo. 72.

Plea that af-
ter the Escape
the Prisoner
appear'd by
Consent, pro-
ut, &c.

fo. 73.

Nul tiel Re-
cord, whereby
it appears he
appear'd by
Consent.

THE Declaration sets forth, that the Plaintiff prosecuted a Writ in Hill. 1 Jac. 2. against Ralph Hayes in Trespass quare Clausum fre- git, with intent to declare in Debt for 33 l. that the Writ was retornable Craft. Ascen. deliver'd the 13th of April, and the Defendant thereon arrested and permitted to escape. To which the Defendant pleads, that after the supposed Escape, Hayes, by the Plaintiff's Consent, appear'd at the Return of the Writ pro ut per Recordum. The Plaintiff replies, quod nul tiel Record, whereby it appears, that Hayes appear'd by the Consent, &c. to which the Defendant demurs for that the Plaintiff had put double Matter in Issue.

For the Defendant it was insisted, that the Replication was ill, because the Allegation of the Appeal of the Defendant was sufficient, and the Allegation over that it was with the Consent, &c. was immaterial, and that the Plaintiff might have travers'd the Record of the Appeal only. But on the other side it was moved, that the Bar was ill. And for that, Hobb. 210. 2. Webb and Canning's Case. Latch. 149. Calse and Bingle's Case; and 1. Jones 138. The same Case, and 2 Rolls, Rep. 119. Worsley's Case were cited. But by Consent the Parties amended.

Action on the Case.

31

Grammer *versus* Watson.

Pasch. 1 Jac. 2. Rot. 377. C. B.

THE Plaintiff declares, that Sir William Child was Farmer of Oxton Netherhall in Com' Nott' of which 20 Acres of Land in Blidworth, in the Tenure of the Plaintiff, are Parcel, and alledges a Prescription in Sir William Child to have Common of Pasture for the said 20 Acres of Land in a Wast called Alamore. That Sir W. Child, 15 Apr. 30 Car. 2. granted the said 20 Acres to the Plaintiff in Fee. That the Defendant put his Cattle, &c. into the Common, to the prejudice of the Plaintiff's Common. The Defendant pleads in Bar, and confesses that Sir W. Child was Farmer of the Mannor, and that the said 20 Acres are Parcel thereof, and Copyhold Land, and likewise the Plaintiff's Right of Common, as alledged in the Declaration; and confesses also the Grant of the said 20 Acres to the Plaintiff: But says, that the Archbishop of York, before the Grant of the said 20 Acres to the Plaintiff, was seised in Fee, &c. of the Mannor of Southwell, of which one Messuage, &c. is Parcel and Copyhold Land, and alledges a Prescription in the Bishop to have Common for the Tenants of the said Messuage, &c. in the said Wast. That the Bishop granted the Messuage, &c. to the Defendant's Father in Fee: That his Father died and he entred, and so he justifies the putting his Cattle into the Common with proper Averments. The Plaintiff replies, maintains his Declaration, and traverses the Prescription alledged by the Defendant, whereon Issue is joined; on which Issue the Jury find, that the said Wast of Alamore is within the Forest of Sherwood; that the Messuage, &c. of the Defendant, are within the Purlieu

fo. 74.
Action on
the Case for
Disturbance
of Common.

Bar.

Replicat'

Special Ver-
dict.

Purlieu of the said Forest, and find the Prescription for Common alledged by the Defendant ; sed utrum, &c.

fo. 81.

It was insisted by the Plaintiff's Council, that the Prescription in the Bar was ill, because the Fence-Months were not excepted, and also because Sheep are not excepted, *quod mirum* : For if the Prescription in the Bar be ill for those Faults, the Prescription also in the Declaration is ill for the same Reason ; and then how will the Plaintiff have Judgment ? 2. And the Prescription in the Count is also ill for another Reason, which was not moved at the Bar, *viz.* That the Prescription for Common to the Tenements by a *Que Estate* in a Tenant for Years of a Mannor, is ill. Mannor ; which can't be.

The Case was moved but once, and not then resolved ; but it appears by the Court-Books, that Judgment was given for the Defendant. That there may be Common by Prescription in a Forest for Sheep, these Books are Authorities, *viz.* 1 Roll's Rep. 411. Bulstr. Par. 3. 213. The Opinion of the Lord Coke is so in 4 *Instit.* 298. Jones 285. Englefield's Case. 2 Cro. 155. resolved. The Opinion of Keeling in the Case of the Corporation of Derby *è contra*. And by Manwood in his *Forest Law* too, one can't prescribe for Common in a Forest for Goats. See *Manwood* 9.

How it ought to be.

Note, That the Prescription is alledged by a *Que Estate* in Sir William Child, who was but a Farmer of the Mannor : But it seems that the Prescription ought to be, that the Lord in Fee of the Mannor, and all those whose Estate, &c. have had Common, &c. for their Tenants and Farmers of the said Mesuage, &c.

Note

Note also, That it is now adjudged in *Trigg and Turner's Case*, 3 *Levinz* 98. That one may prescribe for Common for Sheep in a Forest in the Fence-Months.

A Man may prescribe for Common for Sheep in a Forest in the Fence-Months.

Prideaux versus Morrice.

Trin. 12 W. 3. C. B. Rot. 655.

THE Declaration recites the Writ to the Sheriff of Cornwall to elect a Member there in the Place of John Morris, Armig^r who had been elected for the Borough of Saltash, and also for the said Borough of N. and had elected to be Member for Saltash: That the Writ was delivered to the Sheriff, who made out a Precept to the Vianders to, &c. That the Precept was delivered to the Defendant: That Proclamation was made such a Day, &c. and the Plaintiff then elected: That the Defendant made the Indenture, and inserted Francis Stratford elected, which he returned to the Sheriff with the Precept, who returned the Indenture into Chancery, per quod the Defendant lost his Place in Parliament, and spent, &c. The Defendant pleads not guilty, and Issue thereon, and on the Trial a Special Verdict was found, whereby all the Parts of the Declaration were found, except the Conclusion of the Declaration, viz. per quod, &c. And beside that, two other Matters were found which are not alleged in the Declaration, viz. That one W. Isbell, at the time of making, &c. the Warrant, was one of the Vianders, and that he is alive; That there had not been any Determination made in Parliament of the Right of the said Election, or of any other Election for the same Place.

fo. 82. *Action on the Case v. the Defendant, one of the Vianders of the Corporation of Newport, for a false Return of a Member of Parliament.*

Special Verdict.

This Case was argued two or three times at the Bar, and a great deal was said on both sides;

fo. 88.

sides ; but the Resolution of the Court being full and satisfactory, I shall only make Mention thereof.

In *Easter* Term, *Anno primo Annæ Reginae*, Sir *Thomas Trevor*, Chief Justice, deliver'd the Opinion of the whole Court to the Effect following.

1fo. 89.
No Action
lieth before
Determination
in Parliament.

We do not give any Opinion whether, if there had been a Determination in Parliament for the Plaintiff, an Action would lie or not, because the Jury have found expressly that there was no such Determination. We give no Opinion, whether the Action be well brought against one of the Vianders, or no: But we are all of Opinion, that the Action lies not before a Determination of the Election in Parliament. Admitting that the Parliament had determin'd against the Plaintiff, could he have brought an Action? The Inconveniency and Reason are the same. They are the proper Judges ; and if the Action may be brought before such Determination, then the Jury may make a Determination by their Verdict, contrary to the Determination of the Parliament.

Stat. H. 6. It may be objected, that an Action on the Statute of H. 6. may be brought before any such Determination: But there is not the same Reason in this Case ; but for that particular Action the Statute gives Authority to do it. But that Statute can't be extended further than is express'd by the Words, and no Action on the Case lay at Common Law.

That Statute gives a Penalty of 100 l. and if any Remedy had been at Common Law, there had been no Need of that Statute.

No Action
lay at Com-
mon Law.

In Courts which have concurrent Jurisdiction, that Court which is first possessed of the

the Cause, shall determine it: And if an Action be brought in one of them, and another Action in another, the first Action may be pleaded in Abatement, or in Bar of the last Action, if Judgment be given in the former. In that Case no different Judgment can be given, but in the Case before us there may.

Where Courts have concurrent Jurisdiction, that which is first possess'd shall determine.

It hath been objected, that there may be a Failure of Justice, because the Parliament may be dissolved before the Determination.

Obj.

We can't take upon us to supply the Defects of Statutes. No such Action was ever brought before the Case of *Nevil and Strode*, 1658. 2 *Sid.* 168. and no Determination of that Case appears to me; and therefore it is a great Presumption that the Action lies not. The Case here is more strong than the Case of *Barnadiston and Somes* (which is reported in 2 *Lev.* 114.) as that was for a double Return: But that is not material; the Falsity is the Foundation of the Action in both Cases. In another Point there is a Difference; for in the Case of *Barnadiston* there was a Determination for *Barnadiston*, and yet adjudged that the Action lay not.

Ref.

He also cited 3 *Lev.* 29. *Onslow and Rapley's* Case. And there is another Reason, as he said, in this Case, *viz.* because the Right of a third Person is to be determined by the Determination in this Case.

Note, That it was made appear to the Court, that the Judgment given for *Barnadiston* in the *King's-Bench* was reversed in the *Exchequer*, and that Judgment of Reversal was affirmed in the House of Lords; *ideo ne amplius inde clamorem audiam' &c.* *Prat* and *Cartwright*

Action on the Case.

threw for the Plaintiff, Darnel the King's Serjeant, and Lutwyche for the Defendant.

Bayntine versus Sharp. C. B.

fo. 90.
Case against
the Owner of
a Mad Bull
which wounded the Plaintiff.

THE Plaintiff brought an Action on the Case, and declared quod cum the Defendant such a Day, quendam Taurum ipsius Def. scidit, Anglice cut or boxed, whereby the Bull became Mad, & sic furiosus existen' pro defectu debite custod' did toss, gore and wound the Plaintiff, per quod diversa negotia of the Plaintiff infected remanser' ad dampn' &c.

Note, That after Verdict for the Plaintiff, the Judgment was arrested, because 'twas not said in the Declaration that the Defendant knew the Bull was mad.

Allen versus Stephenson.

Hill. 11 W. 3. C. B.

fo. 90.
Action on
the Case for
negligent
keeping of
Fire.

THE Plaintiff declares, that secundum consuetud' Regni Angliæ, every Housekeeper ought always safely to keep his Fire, least in default of the safe keeping of the Fire of such Housekeeper, or any of his Servants or Lodgers, any Damage should happen to any Person, &c. That the Defendant 17 Jul' 11 Reg' was a Housekeeper in Chancery-Lane, and took a Lodger, who so negligently kept his Fire, that the Plaintiff's Goods were burnt and spoilt, &c.

Note, In Easter Term, after Verdict for the Plaintiff, Judgment was arrested for the Strangeness and Insufficiency of the Declaration.

Hewet

Action on the Case.

37

Hewet versus Copland.

Trin. 2 W. & M. Rot. 1577. C. B.

IN an *Action on the Case* for erecting a Stable and other Buildings to the Annoyance of the Plaintiff's Garden in Norwich, the Defendant pleads a Custom in Norwich to erect such Buildings, &c. and alleges a Prescription to burn Coals, &c. and to put Horses in the Stable, and to use a Wash-house as Occasion serv'd. The Plaintiff replies *de injuria sua propria*, and traverses the Custom alledged in the Bar. The Defendant rejoins and maintains his Traverse, and Issue thereon.

fo. 91.
Action on
the Case for a
Nuisance.

There was a Trial on that Issue, and a new Trial awarded; but it doth not appear that any thing was done after.

fo. 95.

Cowper versus Towers.

Hill. 10 W. 3. Rot. 1789. C. B.

THE Plaintiff declares, that such a Day he lent the Defendant a Horse, which he tam graviter onerabat, that by reason thereof it died; and declares likewise on a Trover and Conversion, &c. The Defendant pleads non cul' infra sex annos. The Plaintiff replies, that he sued out an Original in Trespass quare clausum freg' &c. directed to the Sheriff of York, and returnable the same Term of which the Record is, viz. Hill. 10 W. 3. That the Defendant is guilty within 6 Years before the Original Et hoc petit &c. Rejoinder that the Original was purchased with intent to declare in Debt for 7 l. and traverses that it was prosecuted to the intent mentioned in the Replication. The Plaintiff demurs, for that the De-

fo. 98.
Case for im-
moderate ri-
ding a Horse
lent.

Defendant traverses Matter not traversable, and the Defendant joins in the Demurrer.

fo. 101.
In what Case
the Plaintiff
can't take a-
way the De-
fendant's Li-
berty of An-
swering.

Judgment was given for the Defendant only because the Plaintiff had concluded his Replication to the Country where he ought to have concluded with an *Hoc parat' est verificare*; for *per Cur'* when the Plaintiff is obliged (as here) to shew another Original than that which by general Intendment is the very Writ in the Case, there he can't take away the Defendant's Liberty of answering thereunto. And this Case differs from the common Case of *plene administravit*, where the Plaintiff replies that the Defendant had *Affets tempore Impetrationis brevis originalis ipsius Quer.* For in that Case it is intended the true Original in the Case.

Note, No Exception was taken that two distinct Matters, *viz.* the Abuse of the Horse on the Loan, and the Trover of the Horse were contained in one and the same Action. But see for that, 1 *Sid.* 244, 245. 2 *Ventr.* 223. Co. 8. 47. b. *Allen* 9. *F. N. B.* 88, a. 88. b. *Cro. Car.* 20. 3 *Keb.* 59.

Hassard versus Cantrell, & al.

Hill. 6 *W.* 3. *Rot.* 1084. *C. B.*

THE ACTION on
the Case for
Disturbance
of Common.

fo. 102.

THE Declaration sets forth, that Elizabeth Barnes, and Dorothy Paston, in their own Right, and Erasmus Philips, Bart. and C. his Wife, in the Right of C. and Tho. Milward, and A. his Wife, in the Right of A. were seised in Fee of a Messuage, &c. in Hartshorne, and alleges a Prescription in all of them to have Common of Pasture, &c. in Hartshorne Common; That all

of

of them, except the Wife of Milward, demised the Messuage, &c. to the Plaintiff at Will; That the Defendants put into the Common 16 Horses, &c. 2. That they erected a Warren, &c. and, 3. That they chased the the Plaintiff's Cattle cum Canibus. The Defendants as to the Chasing plead not guilty. And as to the Residue, that the Defendant Cantrel was seised in Fee of the Mannor of Hartshorne, of which Hartshorne Common is Parcel, and therefore they put the Cattle in the Declaration into the said Common, &c. That a tempore cujus contrar' &c. the Defendant C. had a free Warren in the said Mannor, and therefore they justify the making of Coney-Burrows, &c. and aver, that the Plaintiff had Sufficiency of Common. The Plaintiff as to the putting the Cattle into the Common, after several Protestations maintains his Declaration, and then traverses the Sufficiency of Common. And as to the making the Warren, &c. after protesting that he had not Sufficiency of Common, avers his Declaration as to that, and then traverses the Prescription for the Warren. Demurrer and Joinder in Demurrer.

As to the putting the Cattle into the Common, Exception was taken to the Bar that it did not appear thereby, that the Cattle which were put into the Common were the proper Cattle of the Def. Cantrell. The Declaration doth not alledge any such thing; and tho' he hath Possession of the Cattle *non sequitur*, that he hath the Property. If a Man brings Trespass *quare equam a persona sua cepit*, without saying *suam*, it is ill, Pural and Bradley's Case, *Yel.* 36. adjudged, and in Brook's Case, *1 Sid.* 184. it is resolved to be ill on a Demurrer. See now for that *2. Lev.* 20. *Dunwell & Ux' v. Marshall.* And the Lord

fo. 107.

can't put in the Cattle of a Stranger, *Roll. tit. Common 396. Lett. A. Numb. 3 & 4.*

But to that the Court gave no particular Answer.

And as to the Objection which was made by the Defendant's Council, that the Sufficiency of Common was not traversable :

The Sufficiency of Common is traversable.

If a Surcharger is alleged in the Declaration.

To that it was answered by the Plaintiff's Council, that it was well traversable, because it is the Means whereby it may appear, whether the Defendant had surcharg'd the Common or not, and if he had, an Action on the Case would lie for the Plaintiff; and so are many Books, and so was the Opinion of the Court. But then the Defendant's Council objected, that that could not be as this Case is; for the Plaintiff by his Declaration hath not charged the Defendant *Cantrell*, the Lord of the Mannor, with any Surcharger of the Common, but only had said that by that Means he could not have his Common in so beneficial a manner as before, which might be true tho' the Common was not overcharged; and of that Opinion was the Court.

But then it was objected by the Plaintiff's Council, that the Lord of the Soil could not make Coney-Burrows, and put Coneys into the Common, and for that he cited *Grifit and Leig's Case. 1 Jones 12.* and *Grifel and Hoddinfern's Case, Vel. 143.* which are Cases in point.

fo. 108.
The Lord of the Soil may put in Beasts of Warren.

But the Court was of Opinion, that the Lord of the Soil might put in the Common Beasts of Warren, as well as other Beasts, according to *Huddesden and Grifel's Case, 2 Cro. 195.*

But

But then it was objected by the Plaintiff's Council, that the Defendants had not relied on any Justification, by reason of the Defendant *Cantrell's* Right as Lord of the Soil, but had made that only an Inducement to the Prescription for the Warren; and therefore they not having relied on the first thing they have given Advantage to the Plaintiff to traverse the Prescription of the Warren, and for that he cited *Cro. Car.* 173. the Earl of *Pembroke's* Case, and *Dyer* 365. Sir *Francis Leke's* Case. And of that Opinion was the whole Court, and Judgment given accordingly. See now for that last Point, 1 *Vent.* 271, 272.

An Exception was taken to the Declaration, that the Demise to the Plaintiff is alleged to be the 26th of *March*, and the Tort the 1st of *May* following, and it is not alleged that the Plaintiff entred before the 1st of *May*, but to that it was answer'd by the Court, that it should be intended he entred immediately after the making the Lease. Judgment for the Plaintiff. *Wright*, the King's Serjeant, for the Defendant, and *Lutwyche* for the Plaintiff.

A Lessee shall be intended to enter immediately after the making the Lease.

Stanton versus James.

Pasch. 3 Jac. 2. Rot. 361. C. B.

THE Plaintiff declares, that *Tho. Nightingale, Bart. and Christopher Turner*, on the 9th of *October*, 32 *Car. 2.* were bound to him in a Bond of 200 l. jointly and severally, with Condition to be void on Payment of 103 l. on the 12th of *April* following, at the House of *Walter* Smith,

fo. 108,
Action on the Case for an Escape of one taken on Capias Utlagat before Judgment.

Action on the Case.

Smith, on Ludgate-Hill, London; That the 103 l. were not paid at the Day, or ever after; that the Plaintiff in Michaelmas-Term, 35 Car. 2. impleaded Sir Thomas for the said Debt in the Common-Pleas, who was put in the Exigent, and on Monday next after the Feast, &c. 36 Car. 2. was outlawed; That afterwards, viz. on the 12th of February, 2 Jac. 2. he sued out a Cap' Utlagat' ret' 15 Pasch. That the Writ was deliver'd to the Defendant, then Sheriff of Essex, who arrested Sir Thomas the same Day, and suffer'd him to escape the 20th of April. Demurrer and Joinder in Demurrer.

fo. 110.

This Record was read in order to be argued, but never was; and as I have been informed, Composition was made between the Parties.

Nevertheless I will make some Observation upon it.

Need not
recite how
the Debt be-
came due.

1. That the Plaintiff hath recited the Bond on which the first Action and the Outlawry was, and also the Condition thereof, which was done without any Necessity, altho' it is so done in one Precedent in *Brownl. Latin Redivivus* 33. But that it was not necessary will appear by other Precedents hereafter cited, in which there is no Recital how the Debt became due.

fo. 111.
Nor the O-
riginal in the
Action in
which the
Outlawry
was.

2. That the Plaintiff in the Case here hath not shewn any Original in the Action in which the Outlawry was, but hath only said *quod cum implacitasset &c.* But it seems by the following Precedents, that there was no need of shewing the Original, viz. *Hob. 9.* where the Declaration begins with the Exigent; so *Brownl. rediv.* 218. where an Outlawry is pleaded in Bar; so is *Lib. Placitandi*, 8. which is a Plea in Abatement; so is *Formulæ bene Placitan-*

Placitandi, 19. being a Declaration in an Action for an Escape; so is *Herne* 3 and 4, being a Plea in Abatement: And there is a Note in the Margin, that the Plea was drawn by Serjeant *Hutton*; but yet in *Bro. Red.* 33. and *Lib. placitand.* 8. Pl. 31. the Original and all the Proceedings thereon are recited.

3. I observe that the Declaration doth not conclude with a *prout patet per Record' &c.* But some of the Precedents are with it, viz. the said Precedents in *Bro. Red.* 218. which was a Plea in Bar by Outlawry after Judgment. And *Lib. Placitand.* 8. Pl. 31. where the Original, and all the Proceedings thereon, and the Returns thereof, are recited. And some are without it, viz. *Robinson's Entr.* 9. Pl. 30. *Formulae Placitand.* 19. *Hern* 3 and 4.

Some Precedents with, and some without, *prout patet per Recordum.*

In 2 *Ventr.* 281. in a Plea in Abatement, it is said as here, *Quod quidam A. B. implacitavit &c.* and then that the Plaintiff in *Exigend' posit' fuit ad utlagand' &c.* And there is a *prout patet per Record.*

Note, In *Ven.* there is a Doubt made, whether it ought not to be alledged, that the Defendant did not appear on the Exigent; and therefore it was adjourned to search Precedents; but, as it seems by the Precedents above, there was no Occasion for it.

Quere if Non-appearance on the Exigent ought not to be alledg'd.

Laughton versus Ward.

Trin. 7 *W.* 3. *Rot.* 1703. C. B.

fo. 111.
THE Plaintiff declares, that he was seised in Fee of a Close of Land called L. and of a Close of Meadow called G. and prescribes for a Way. That the Defendant with his Carts and Carriages had a Way.

Action on the Case for disturbing the Plaintiff in the use of a Way.

Action on the Case.

had spoilt the said Way in B. so that the Way was of no use to him. The Defendant pleads that one W. V. was seised in Fee of a Close in T. called B. Close; That the said V. &c. a tempore cuius &c. had a Way from the said common Way in the Declaration, in, by and through the said Way called B. Lane, and from it, to and in the said Close called B. Close, and so back, &c. and so justifies as V's Servant, and with the said V's Carts. The Plaintiff in his Replication confesses, that V. had such Way, but further says, that the Defendant went over the said Close of V. called B. Close, to and in another Close called W. Close. The Defendant in his Rejoinder alledges no new Matter, but solely relies on all the Matter afore set forth. Demurrer and Joinder in Demurrer.

fo. 114.

If a Man prescribes for a Way to B. he can't justify going farther.

'Twas resolved by the whole Court, that the Defendant having prescribed for a Way but to B. Close, could not justify to go over into the other Close of W. V. called W. according to 1 *Rolls Abr.* 391. *Let. R. Numb.* 2 and 3, *Saunders and Moses's Case*, and 1 *Mod. Rep.* 190. *Howel and King's Case*. *Lutwyche* for the Plaintiff.

Note that the Declaration is, That the Defendant had spoilt the Way *cum carrucis & carriag' suis*; and the Defendant justifies with the Carts and Carriages of W. V. *Quære* of the Consequence thereof, for it seems to be material as this Case is.

No Judgment is entred in this Case on the Roll; but it is certain, that the Opinion of the Court was as before, and that Judgment was pronounced accordingly.

Reynolds versus Hewet.

Mich. 12 W. 3. Rot. 594. C. B.

THE Declaration recites, that the Defendant was admitted Rector of, &c. That he resigned, and the Plaintiff deb' modo præsent' fuit &c. and was the Defendant's next Successor, and that the Defendant had left the Mansion-house, &c. out of Repair.

fo. 115.
Action on
the Case for
Dilapidati-
ons.

The main Objection to this Declaration was, that the Resignation of the prior Incumbent was not well alledged; for it's but generally alledged *quod resignasset*, without saying *in manus Episcopi*, as it ought to be according to *Rast. 504. b.* and *519.* And without that it doth not appear that the Plaintiff is legal Successor.

fo. 116.
How to
plead a Re-
signation.
Vid. *Dyer 293.*
pl. 3.

To which it was answered, That true it is, when one makes an immediate Title to himself by virtue of a Resignation, there the usual Manner of pleading is as before alledg'd. But in the Case here, the Resignation is alledged by way of Recital and Inducement for the Gift of the Action; and the Defendant can't take a single Issue on the Resignation, for that would amount to the general Issue. And if he had pleaded *non Cul.* then the Resignation, with the other Things, would be triable by the Jury. And 'twas alledged in the Declaration, that the Plaintiff *præsentat' fuit &c. Et fuit legitimus & prox' Successor &c.*

But notwithstanding the Court were of Opinion that the Declaration was ill for this Cause; and therefore the Plaintiff never had Judgment, but he compounded the Matter with

with the Defendant for little or nothing
Carthew for the Defendant, *Lutwyche* for the
 Plaintiff.

Blockley versus Slater.

Hill. 4 & 5 W. & M. Reg' & Regin' Rot. 1421. C.B.

fo. 119.
 Case for
 Disturbance
 in a Way.

I*N an Action on the Case for Disturbance in a Way, the Plaintiff declares according to common Form, Quod viam habere debuit. The Defendant demurs, for that it doth not appear by the Declaration how the Plaintiff is entitul'd to have the Way, whether by Prescription or Grant. That it doth not appear how the Way could belong to the Messuage; and that these Words, viz. tanquam ad Messuag' præd' cum pertin' pertinen' were omitted out of the Declaration.*

These Exceptions were taken to this Declaration.

fo. 120.
 1 *Salk.* 360,
 361.

1. That it is not said in the Declaration that the Defendant was possessed for Years.

2. It is said in the Declaration, that he was such a Day, and continually after, possessed of the Messuage to which he claims the Way, and also of the Way to it; and yet he after complains of a Disturbance in the Way, which is a Contradiction.

3. It appears by the Declaration that the Gorsty Leasows on which the Way is claimed are the Defendant's Lands, and therefore there ought to be a Title made to the Way, either by Grant or Prescription. But it had been otherwise, if the Action had been brought against a meer Wrong-doer; and for this Diversity *St. John's* and *Moody's Case*, 3 *Keb.* 528, 531. was cited: But notwithstanding

ing that, the Plaintiff had Judgment. *Lutwyche* for the Defendant.

Slipper versus Mason.

Hill. 6 W. 3. Rot. 1203. C. B.

IN an Action for the Escape of a Prisoner on a Writ of Excom' capiend' the Declaration recited the Sentence of Excommunication, that the Person was taken thereon, and that the Defendant permitted him to escape. The Defendant pleads non Cul. and Issue thereon.

fo. 121.
Case for an
Escape on a
Writ of Ex-
com' capiend'

After Verdict for the Plaintiff, several Exceptions were taken in Arrest of Judgment.

fo. 122.

1. That the King ought to be joined in the Action, as in an Action on the Case on Outlawry.

That there are diverse Precedents wherein the King is not a Party, *Robinson's Entr. 9. Herne 167, 168. Mo. 641. Evans and William's Case. Bower and Stokeley's Case, Cro. El. 652. Ashton's Entr. 32.*

Resp.
fo. 123.
Several
Precedents
where the
King is not a
Party.
Writ of Re-
caption is in
Case of Pro-
secut' ex Offi-
cio.

2. That there was another proper Remedy in this Case, viz. a Writ of Recaption, *F. N. B. 64. b.*

To which it was answered by Justice Powell, that that was in Case of a Prosecution ex Officio: And the Chief Justice said, that perhaps he will never be retaken; and then the Party grieved will be without Remedy for the Damage done him by the Escape.

Resp.

3. That the King might pardon the Contempt, and by Consequence the Action on which it is founded is gone.

Right of A-
ction once
vested can't
be discharg'd
by a Pardon.

To which it was answered, that a Right of Action was vested in the Plaintiff immediately

Resp.

diately on the Escape, which cannot be discharged by the Pardon.

Resp.
Bishop ought
not to absolve
without Bail.

4. That the Bishop might absolve him.

That that ought not to be without Bail, &c. and therefore it shall not be intended.

5. That this Action is founded on Matters merely Spiritual, and therefore lies not here, but the Remedy ought to be in the Spiritual Court.

Resp.
The Escape
is a Tempo-
ral Wrong.

That the Process was out of the Temporal Court, directed to a Temporal Officer, and executed by him, and the Escape was a Temporal Wrong, and the Damages thereupon were consequently Temporal; and the Plaintiff had Judgment by the Opinion of the whole Court, tho' it was confess'd to be the first Action of this Nature.

En tiel Case.

And for Maintenance of the Action, these Cases were cited. *F. N. B.* 47. b. *Hob.* 317. 3 *Cro.* 838. 1 *Lev.* 292. 1 *Keb.* 947. 1 *Cro.* 291. 1 *Roll's Abr.* 110. 5 *Co.* *Williams's Case.* 2 *Jones* 132. *Mo.* 641. 3 *Cro.* 652 and 877. 2 *Bulst.* 236. *Mo.* 834. the Case of the Sheriffs of *Bristol* adjudged, that an Action on the Case did lie, for the Escape of a Bankrupt committed to their Custody by the Commissioners; on which Case the Court relied much. *Hall* and *Lutwyche* for the Plaintiff, *Pratt* and *Carthew* for the Defendant.

Jones versus Hamond.

Hill. 13 *W.* 3. in *C. B.*

fo. 124.
Pecia Pastura
Uncertain af-
ter Verdict.

THE Plaintiff brought an Action on the Case for a Disturbance in a Way, and declared that

Action on the Case.

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that he was possess'd de quadam pecia pasturæ in S. and so prescribed for a Way thereto.

After Verdict for the Plaintiff, Judgment was given against him, because that pecia pasturæ was altogether uncertain.

fo. 124.

Pecia pasturæ uncertain after Verdict.

Crowther versus Oldfield.

Mich. 10 W. 3. Hill. 10 & 11. Rot. 1077. C. B.

IN an Action on the Case brought by a Copyholder for a Disturbance of Common, the Defendant pleaded not guilty, and Issue thereon, and Verdict for the Plaintiff.

fo. 125.

Case by a Copyholder for a Disturbance of Common.

After five Motions in Arrest of Judgment, the Judgment was arrested only for one Fault, viz. because it was not said in the Declaration, that the Plaintiff fuit seisit' &c. secundum consuetud' Manerii ad voluntat' Domini; and without those Words ad voluntat' Domini, it shall be intended to be an Estate in Fee at the Common Law, and then the Plaintiff might have prescribed for the Common in his own Name. And notwithstanding it was insisted, that the Declaration alledged that the Lands were Parcel of the Mannor, and that the Verdict had found it and the Custom also (which was impossible, if the Lands were not Copyhold Lands) yet Judgment was given for the Defendant. But a Writ of Error was brought, & adhuc pendet, for the Judgment. *Vid. Rogers and Brady's Case, 2 Ventr. 143 and 144.* And in *Hill and Bolton*, after in this Book, in *Avowry*, the Avowant made Title to Copyhold Lands, without saying they were demised per Copiam &c. ad voluntat' Domini; and the Avowry was adjudged to be

Seisit' secundum consuetud' Manerii, without the Words ad voluntat' Domini, ill.

E

ill,

ill, and for that Cause the Judgment was in *Hill. 2 W. & M. in C. B.* But those two Cases were on Demurrer. And in *Rogers and Hays* Case, entred *Mich. 12 W. Rot. 567.* in a Writ of False Judgment, on a Judgment given in an Action in the Nature of a Formedon, in the Count a Seisin in Fee was alledged *secundum consuetud' Manerii*, without these Words *ad voluntat' Domini*; and thereon an Exception was taken that the Judgment was not removed: *Cur' contra*; for it shall be intended Frank Fee, and the Judgment was reversed. See also for this Point *Cro. Car. 229.*

Vid. 1 Salk. 364. for the Proceedings on the Writ of Error. *Hughes's Case.* In the Case of *Crowthey* and *Oldfield*, *Kene*, *Prat* and *Lutwyche* were for the Plaintiff, *Lewinz* and others for the Defendant.

Nicholson *versus* Smith.

Trin. 13 W. 3. C. B.

fo. 126.
Case for not
grinding at
the Plaintiff's
Mill.

THE Plaintiff declares that he, such a Day, and for four Years before, was possessed of an ancient Corn-Mill in the Parish of G. That there is a Custom for every Tenant of the House hereafter mentioned, to grind his Corn, &c. at the said Mill, and to pay a reasonable Toll, &c. That the Defendant, for four Years before, was seised of an ancient Messuage, &c. and then alledges a Breach of the Custom.

fo. 128.
Custom of a
Mannor can't
be applied to
a particular
Messuage in
a Mannor.

After Verdict for the Plaintiff, 'twas moved in Arrest of Judgment, that a Custom of a Mannor could not be applied to a particular Messuage in a Mannor; and for that, *Baker* and *Brereman's Case*, *Cro. Car. 418.* *1 Ven. 97.* *Polus* and *Henstock's Case* were cited, and there

Action on the Case.

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thereupon Judgment was arrested. *Lutwyche* for the Defendant, *Birch* for the Plaintiff.

Whitrow versus Edwyn & al.

Trin. 3 W. & M. C. B.

fo. 128.

THE Declaration sets forth, that there were due to the Plaintiff, on an Account between him and *E. Thynn* deceased, and *J. Thynn*, so much Spanish Money of the Value of 581 l. 1 s. 6 d. English Money: That the Plaintiff for Recovery thereof sued out a Capias &c. quare clausum fregit ret' tres Trin' &c. with an Ac etiam &c. directed to the Sheriff of Exon. which being returned non invent' a Testatum capias &c. issued to the Sheriff of Middl' ret' tres Mich' &c. on which *J. Thynn* was arrested, and escaped. The Defendant pleads in Bar, and confesses the Arrest, but says, that the Prisoner was rescued. The Plaintiff replies, that in the Parish of St. Andrew, Holbourn, in Com' Middl' there is, and at the time of the Arrest and long before, was, and yet is, a certain Prison called Newgate, being a Prison for the County of Middlesex, and fit to keep Prisoners arrested for Debt, and where Prisoners may be safely kept, and ought within a convenient time after their Arrest to be carried: That the Defendant might have carried the Prisoner there in half an Hour after the Arrest; but instead thereof, carried him to an Alehouse, and there kept him two Days, where he by the Defendant's Neglect escaped. Demurrer and Joinder in Demurrer.

Action against the Sheriff of Middlesex for an Escape.

fo. 131.

Judgment was given for the Defendant, because the Replication was meer History and Matter of Evidence only, on which no certain Issue could be taken. *Lutwyche* for the Defendant.

ACTION on STATUTE and BAR *per* STAT.

Chapman *versus* Gresham.

36 H. 8. Rot. 524. C. B.

fo. 138:
Action on
the Statute of
21 H. 8. c. 13.
§ 26. of Non-
residence.

THE Plaintiff declares, Quod cum in Statute in Parliament' Dom' Reg' nunc apud L. 30 die Novemb' anno regni sui 21 & deinceps usq; Westm' adjournat' per divers' prorogat' ibid' tent' 'tis inter al' enacted, That as well every Spiritual Person then being promoted to any Archdeaconry, &c. or being beneficed with any Parsonage or Vicaridge, as all Spiritual Persons who then after should be promoted, &c. from the Feast of St. Michael then next, should be personally resident upon his said Dignity, &c. or one of them at the least. And in case such Spiritual Person, at any time after the said Feast, should not be resident as aforesaid, but wilfully absent himself by the Space of one Month together, or by the Space of two Months to be accounted at several times, in any one Year; and make his Residence in any other Places, then he should forfeit 10 l. the one Moiety to the King, and the other to the Party who would sue for the same &c. Præd' tamen Defend' qui Spiritualis persona ac Rector ecclesiæ de D. existit & diu fuit Stat' præd' minime ponderans a primo die Martii anno regni Dom' Reg' nunc 23 per duodecim menses tunc prox' sequens seipsum a Rectoria sua præd' voluntarie absentavit & contin' resident' per tot' tempus præd' apud &c. fecit contra formam Statuti præd'

præd' Per quod Actio &c. In Bar whereto, the Defendant pleads, Quod ipse præd' primo die Martii anno supradict' & semper postea fuit & adhuc est homo Laicus & Temporalis persona Absq; hoc &c. To which Plea the Plaintiff demurs, and the Defendant joins in the Demurrer.

Note, Tho' a mere Layman is presented, yet it is not an absolute Nullity, but he is Parson *de facto*, &c. *Dyer 292. b.*

fo. 140.

Note, There are some Precedents in which it is alledged, that the said Statute 21 H. 8. was made at a Parliament *inchoat' or tent'* (which is all one) at *Westminster*, &c. and in *Bond and Tricket's Case* it was so pleaded: And therefore after Verdict it was moved in Arrest of Judgment, that the Statute was misrecited, because the Parliament commenced at *London*, and so was to be pleaded; and thereupon *Cur' advisare vult*. I have seen the Record of that Case, and it is between *Tricket* Plaintiff, and *Bond* Defendant; and there is a Demurrer in that Case to the Defendant's Avowry, and because the Plaintiff did not appear at the Day given on the *Cur' advisare vult*, the Plaintiff was nonsuited, so that much is not to be collected by that Case. But in *Burt and Rothwell's Case* in C. B. which is entred *Hill. 8 W. 3. Rot. 1068.* that Point is determined; where in an Action on that Statute, after Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Statute was misrecited for the Cause aforesaid; and so was the Opinion of the whole Court on due Consideration had; and that the Plaintiff could not have Judgment, because that he had concluded *contra formam Statut' præd'* where there was no such Statute; but

it had been otherwise, if he had concluded *contra formam Statut' in hujusmodi casu &c.* 3 Keb. 468. *Palmer and Taylor's Case*, and 847 and 848. And it was said by the Court, that the true and sure Way of pleading that Statute, was in *Co. Entr.* *Lutwyche* was of Council with *Burt*.

How to plead a Statute made at a Session of Parliament held by Prorogation. *Note also*, That when a Statute is made at a Session of Parliament held by Prorogation, the most short and sure way is to plead, *Quod ad Session' Parliamenti tent'* such a Day and Year, at such a Place. *Ford and Hunter's Case*, 2 Cro. III. 4 Inst. 27.

Malabar against the Inhabitants of Lakenheath, &c.

fo. 141.
The Form of proceeding against Profterners of Fences of Land, approved out of Commons.

FIRST, a Writ issued ought of Chancery directed to the Sheriff, tested the 12th of May, 32 C. 2. ret' Craft. Trin. to inquire qui Malefactores &c. noctanter prostraver' and on Security given by Malabar to attach them, &c. by virtue whereof the Sheriff return'd an Inquisition taken the 29th of May, 32 C. 2. which found that on the 1st of April, 31 C. 2. &c. Malefactores ignot' had proftern'd 600 Perches of the said Fences, &c. and that they had done it with so great a Multitude, that by means thereof they could not be known: Whereupon a Writ was awarded to the Sheriff on the 31st of June, 32 C. 2. out of B. R. ret' 3 Mich' reciting the former Writ, and the Return thereof; by which last Writ the Sheriff is commanded quod non omitt' &c. but that he distrein the next Villages to levy the Fences, &c. and inquire what Damages Malabar had sustained, &c. On which Writ Issues are returned on the next Villages, and

and an Inquisition taken the 1st of July 32 Car. 2. whereby 45 l. 9 s. 2 d. Damages are found by reason of the prostering, &c. The Inhabitants appear, and protesting that great part was not prostered, and that the Damages in the Inquisition were not sustained, plead as to the prostering, &c. That the Mannor of M. was an ancient Mannor, and extended, &c. and that the Fences were raised in a certain Place called W. being parcel of the Mannor of M. of which Mannor of M. one H. North, Bar. tempore quo &c. was, and now is seised in Fee; and that a tempore cujus &c. there were in M. several Freehold Tenements held of the said Mannor: That within the Mannor of M. there was another Mannor, called T. held of the said Mannor of M. of which Mannor of T. diverse other Freehold Tenements were held: That in M. there is another Mannor, called A. held of the Mannor of M. and that within the Mannor of A. a tempore cujus &c. there is a Messuage parcel thereof, and also diverse other Freehold Messuages: That within the Mannor of M. there are diverse Copyholds; and that within the Mannor of A. there are diverse Copyholds. And then prescribe for the said several Tenants seised in Fee, to have the sole Pasturage. That within the Mannor of M. there is a Custom for the Copyhold Tenants to have the sole and several Pasturages, &c. that the Lord of the Mannor of A. & omnes ill' quorum &c. have had for themselves and their Tenants of the Customary Messuage of A. the sole and several Pasturage: That the Fences were levied to the Damage of their Pasturage, so that they could not have their several Pasture; and so demand Judgment, si &c. And as to Damages, say, that Malabar sustained no more than 5 s. Damages, which they tender, and traverse that they sustained Damages to the Value of 45 l. 9 s. 2 d. or any other Sum above 5 s.

Malabar replies, That Sir H. North was seised in Fee of the said Mannor of M. of which W. is parcel, and contains 160 Acres: That the said Free and Customary Messuage is parcel of M. and the Mannors of T. and A. are held of the Mannor of M. That the said Sir H. North approved 20 Acres according to the Statute, and that sufficient Common was left, &c. That Sir H. North, 1 Mar. 31 C. 2. enfeoffed Malabar thereof, to hold to him and his Heirs (to the Use of him and his Heirs omitted.) Then traverses the Prescription and Customs alledged, and thereupon Issues are joined. Judgment for Malabar, and Damages to 45 l. 9 s. 2 d. assessed by the Jury, which Malabar relinquishes: Whereupon Judgment is given, that Lakenheath, &c. levy the Fences, and restore to Malabar the Damages assessed by the Inquisition, and Execution awarded accordingly.

fo. 154.

I have seen the first Draught of a Writ, which issued on the before Judgment, in which the whole Record thereof, except the first Writ, was *verbatim* recited; but the Writ perused and corrected by Sir John Holt, now C. J. of the King's Bench, with his own Hand, is truly made a Writ, whereas it was before a long and tedious History to no purpose: The Substance of which Writ so corrected here followeth.

fo. 155.

The Writ recites the other Writ out of Chancery, whereby the late Sheriff was commanded to inquire *qui Malefactores*, &c. had prosternd the Fences, &c. of N. Malabar, at, &c. that the late Sheriff return'd an Inquisition on the 29th of May, 32 Car. 2. whereby it was found that *quidam Malefactores* ignot' had prosternd 600 Perches, &c. in the said Writ mention'd, and then recites the *Distringas* with *Non omitt'* and the Writ of Inquiry

ry of Damages sustain'd by N. Malabar, on which the said late Sheriff had return'd ; that *Lakenbeath*, &c. were the next Villages, and also had return'd an Inquisition whereby it was found that *Malabar* had sustain'd 45 *l.* 9 *s.* 2 *d.* Damages, and then commands the Sheriff *quod non omitt' &c. quin fieri fac' &c.* and distrein them to erect the Fences, &c.

The Learning of this Case of *Malabar* being uncommon, I shall here put together all that I have collected out of the Books concerning it.

fo. 156.

It is to be observ'd, that the Judgment in this Case is for the Damages found by the Inquisition, without any Regard to the Damages found by the Jury on the Tryal of the Issues, tho' the Damages found by the one and the other are the same ; and this Judgment is warranted by the Case between the King and the Villages of *Upwood*, &c. 1 *Sid.* 212. where on an Inquisition in the like Case as here, there were 80 *l.* Damages found ; and thereupon a *Distringas* issued, and the Inhabitants came in, and pleaded that the Fences were not prosternd *noctanter*, and the Issue thereon was found against them. And second Damages were also found ; and the next Term it was moved that the first Damages should be set aside, because the Inquisition is only to ascertain which Villages ought to do it, to the Intent that a *Distringas* should go out against them, and was not ever intended to conclude any by an Inquest of Office on which no Attaint lies.

2. Reason, because the first Damages were assessed before the Inhabitants were summon'd, and so they were never heard to excuse themselves, or to mitigate the Damages.

Also

Also they might plead to the Right on the *Distringas*, and therefore there was no Reason that they should be concluded as to the Damages found by the Inquisition.

fo. 157.

But by the Court the former Damages shall stand, and shall not be vitiated by the second, because the second Verdict as to Damages was void, because the sole Matter to be try'd by that Jury was the *Noctanter*; but they directed the Prosecutors, for their better Security, to release the second Damages. 'Twas also said by the Court, that if the Damages are excessive, the Parties are not without Remedy; for when they come in to plead to the *Noctanter* they may take by Protestation, that the Damages were excessive, and after plead that the Damages were but of such Value.

Then it was mov'd that they might plead to the Excessiveness of the Damages; but the Court would not suffer it, for that they had not taken it by Protestation before the first Issue found against them, but gave Judgment for the Plaintiff.

In the Case of the *Queen-Mother* against the Inhabitants of *Somerſham*, 1 *Sid.* 107. after 500 *l.* Damages were found by the Inquisition, a *Distringas* issued to the Sheriff to levy them on the Villages adjacent; upon which they came in, and prayed to have Liberty to plead, otherwise they should be condemn'd unheard.

It was doubted whether a *Scire facias* ought to have issued before the *Distringas*; but on Consideration the Court thought that the *Distringas* ought to have contained a *Scire facias* in it, and so they obtain'd Leave to plead.

In

In the Case between the King against the Inhabitants of *Woodford*, &c. 1 *Lev.* 108. on the *Distringas*, two of each Village came and pleaded for themselves and the other Inhabitants of the several Villages, that the Fences were prostrated in the Day-time, when the Persons might be known. *Absque hoc* that they were prostrated in the Night-time, or at such time that the Offenders could not be known, and Issue thereupon. On a Trial of this Issue at the Bar, it was agreed by the Court, that if the Prostration be in the Day-time, or in the Night, so publickly that the Malefactors were known, it is not within the Statute; for the Statute was to give Remedy where they were without Remedy by Action of Trespass, and so it was done in this Case: And therefore Verdict was given for the Defendant by the Direction of the Court. And to the same Effect is the 2 *Inst.* 476. and on the Words in the Act of *Westm.* 2 *C.* 46. viz. *Et cum contingat aliquando quod aliquis jus habens appruare fossat' aut sepem levaverit & aliqui noctanter vel alio tali tempore quo non credant fact' eorum sciri fossat' aut sepem prostraverint nec sciri poterit per Verdictum Assizæ aut Furatæ qui fossat' aut sepem prostraverint nec velint homines de Villat' vicin' indictare de hujusmodi culpabiles distringantur propinque villate circumadjacent' levare ad custag' proprium & damna restituere.* And there it is said that the Inhabitants of the Villages shall have a Year and a Day to indict the Offenders. And in the Case of *Sir S. Procter* against *Sir J. Mallery*, 1 *Roll's Rep.* 365. it is said by the Lord Coke, that he had seen an ancient Reading, in which it was held that the next Villages shall have a Year and a Day to indict the Offenders, and if they

fo. 158.

they shall not be indicted within that Time, then they shall not be indicted on the Statute to repair the Enclosure ; but the Party grieved shall have an Action on the Statute, as a Man that is robb'd shall have on the Statute of *Winton*. And that there is a Note in the Margin of the Reading, that in the Time of *E. 4. Pigot* Justice, held according to the Reading. And by the Record it seems to me to be good Law, and the Lord Chancellor afterwards particularly agreed to all that which was said by *Coke*. And in *Cro. Car.* 280. Exception was taken that it was not shewn that the Plaintiff was Lord of the Wast, and had Right to approve, *sed non allocatur*, because that it ought to come in of the other side.

Another Objection in this Case, was, that the Enclosure being in part of the *Forest of Deane*, it is not shewn that the Enclosure was with the King's Licence, and then it is without Warrant, *sed non allocatur* ; for it ought to come in by Plea after Appearance, and not by way of Exception. *Vid. Cro. Car.* 439. the King against the Inhabitants of *Epworth*, &c. And *Cro. Car.* 580. where there is a *Cur' advisare vult*, if a *Distingas* lies against the Inhabitants without a *Scire facias* to answer. *Vide Thesaur' Brevium*, 154 & 155.

Story *versus* Pleasaunce.

Pasch. 2 Jac. 2. Rot. 683. C. B.

fo. 159.
Informat' on
the Stat' 25
Car. 2. called
The Test-Act.

THE Informer saith, that the Defendant on the 9th of August, 34 *Car. 2.* and for six Months and more, then last past, had exercised the Office

Office of High Bailiff, of the Honour of Pickering, not having taken the Oaths, nor subscribed the Declaration in the said Act, and prays Process against the Defendant; and that he may have 500 l. forfeited by the Defendant by virtue of the said Act.

The Defendant *ex gratia* Cur' appears by Attorney, demands Oyer of the Information, and prays an Im-
Appears by Attorney ex gratia.
 parlance, and then pleads in Bar, that he, after the Act, and before the 1st of August, Anno 25. in the said Act mentioned, viz. at the Quarter-Sessions of the Peace held for the North-Riding of the County of York, before such Justices by Name in open Court, between the Hours of 9 and 12, took the Oaths of Allegiance and Supremacy, and subscribed the Declaration in the said Act mentioned; whereupon the Plaintiff replies, and (protesting that the Defendant before the said 1st of August did not take the said Oaths and subscribe the Declaration) says that at the time of making the said Act, or some other time before the said 1st of August, &c. the Defendant had the Office in the Information mention'd. Demurrer and Joinder in Demurrer.

Judgment was given in this Case for the Defendant, but for what Reasons I can't at present positively declare, not having any Note thereof; but yet I will make some Observations in the Case, which peradventure may be of some use.

fo. 162.

And first, as to the Information it self, it seems that it hath not well pursued the Act, as to setting forth the Offence against it; for by the Statute those Persons who had Offices before the first Day of Easter-Term 1673, which were in London or Westminster, or within thirty Miles of them, during that Term were to take the Oaths in the Court of Chancery, or in the King's Bench, or at the Quarter-Sessions of the County, or Place

By the Act
 Persons who
 had Offices
 before 1st of
 Easter-Term,
 1673, and
 who were re-
 sident, &c.
 should, &c.

where

where they should be resident on the 20th Day of *May* before the 1st Day of *August* 1673.

And Persons who should be admitted after, &c. and at the time of such Admission should be resident, &c. should, &c. And by another distinct Clause those Persons which should be admitted, &c. into any Office, &c. after the first Day of the said *Easter-Term*, and who at the time of such Admission, &c. should be resident at *London* or *Westminster*, or within thirty Miles of them, should take the Oaths in the Courts aforesaid in the next Term after, or, in default thereof, at the Quarter-Sessions of the County and Place where they should be resident next after such Admittances.

The Informant ought to have applied the Offence to one of those Particulars.

So that (as it seems) the Information ought to have applied the Offence to one of those Particulars, that the Defendant might have made a direct Answer thereto, and that such ill Allegation that the Defendant on the 9th of *August*, 34 *Car.2.* & *per sex menses & amplius tunc ult' preterit' & per sex menses tunc proxime sequen' & extunc hucusq; gerebat & exercuit Officium præd'* is insufficient; for it might be true if he had exercised the Office before the first Day of *Easter-Term*, or after the said Term, but as it seems it ought to have been alledged that the Defendant at such a Time had been first admitted into the said Office (*or had entred, or was placed or taken into the said Office*) as the Words of the Statute are, and that he had not taken the Oaths, &c. at such Time and Place after which they are required by the Act, and not so generally that he had never taken the Oaths, &c. according to the Form and Effect of the Act, which seems to be too loose and uncertain, especially in an Information on a Statute so penal. *Vide* for that, 1 *Lev.* 145. *Brookes and*

Deane's

Deane's Case, and 3 Lev. 293. *Walnough* and *Holgate's* Case. And (as it seems) it ought also to have been particularly averr'd, that the Defendant, after his Neglect to take the Oaths, &c. had exercised the Office; for without it the 500 l. are not forfeited by the Act. And averr'd that the Def. after his Neglect exercis'd, &c.

I am very certain there was an Exception taken to the Information, for that Process was thereby only prayed against the Defendant to answer the Premises, *quodque ipse habere valeat 500 l. per prædict' F. occasione premiss' forisfact' vigore Actus præd'* which amounts to no more than that he might be enabled to have the 500 l. whereas the 500 l. ought to have been demanded with such Conclusion, *per quod Actio accrevit eid' R. ad habend' & exigend' præd' 500 l.* But it had been a greater Question if the Information had been ill had it been so; for altho' in an Action on the Stat. 23 Eliz. cap. 1. for Absence from Church, the Conviction for the Offence may be in the same Action wherein the Forfeiture is demanded, (as Co. 11. 59, &c. and Roll's 1 Rep. 90. 234. Case 6. and 3 Bulstrode 87. the King against *Law*, are) yet there is great difference between the penning of that Statute and Stat. 25 C. 2. for in the former Statute it is only said, that if one absent himself from Church, &c. and being thereof lawfully convicted (without shewing how) he shall forfeit, &c. But by the Act 25 C. 2. it is enacted, that whosoever shall neglect to take the Oaths, &c. and after such Neglect shall execute the Office, and being thereof lawfully convicted on an Information, Presentment or Indictment, &c. shall forfeit 500 l. to be recovered by him who will sue for the same by

Where the Convict' may be in the same Action where the Forfeiture is demanded.

by any Action of Debt, Suit, Bill, Plaint or Information ; so that there are other Means prescrib'd for the Recovery of the Penalty, which are by the Conviction of the Offence, and by consequence the Conviction ought to precede the Action for the Recovery of the Penalty.

Where it
ought to pre-
cede.

As to the Plea in Bar, that (as it seems) is nothing to the Purpose, because that it doth not appear that the Defendant had the Office before the 1st of *August* 1673, or at the Time that he took the Oaths, &c. And without doubt the Intent of the Act was, that the Oaths, &c. should be taken, &c. in respect of the Office.

Quære also, if the Conclusion in such Case ought not to be, *prout per Record' &c.* for it is appointed by the Act that a Record should be made of all those Matters. And in a Trial at Bar in the *Common Pleas* between *Slatford* and *Thurston* concerning the Office of Town-Clerk of *Oxford*, it was resolved, that such Record was the sole Evidence of the taking of the Oaths. Which Case is to be seen after in this Book, under the Title *Error*.

Gay versus Welch.

Hill. 2 & 3 Jac. 2. Rot. 520. C. B.

fo. 164.
Debt *qui tam*,
&c. for using
a Trade not
being an Ap-
prentice, &c.

THE Plaintiff declares, quod cum per 5 El. 'twas enacted, That after the 1st of May then next, it should not be lawful for any Person other than such as at the time of the Act did lawfully use or exercise any Art, Mystery, or manual Occupation, to set up, use or exercise any Craft, Mystery, or manual

usual Occupation at the time of the Act used or occupied within the Realm of England or Wales, except he shou'd have been brought up therein seven Years at least as an Apprentice, upon pain that every Person willingly offending or doing to the contrary should forfeit and lose for every Default forty Shillings for every Month, one Moiety whereof shou'd be to the Queen, and the other to him or them who wou'd sue for the same. Et in facto dicit, that the Art or Mystery of a Tallowchandler was at the time of making the said Act an Art and Mystery used infra Regnum Angliæ, viz. apud, &c. And that the Defendant a 29 Die Novembris 1 Jac. 2. apud, &c. did set up and exercise the the Art of a Tallowchandler, ac præd' Artem sive Misterium ab eodem 29 Die Novembris did use, exercise and continue per spacium decem Mensium, and had not serv'd as an Apprentice in eadem Arte per spacium septem Annor' per quod, &c. To this the Defendant pleaded Nil debet.

After Verdict for the Plaintiff it was moved in arrest of Judgment, That the Action did not lie at Westminster by reason of the Stat. 21 Ja. C. 4. But the Case being of great Consequence, was ordered to be put into the Paper, and so it was; and argued the next Term after by the Council of both sides, and many Cases were cited by them (Three Judges being only present) viz. *Barns* and *Hughes's Case*, 1 Sid. 400. *Dyer* 236. 3 Cro. 737.

fo. 165.

2 Keb. 401. *Latch* 192. *Raymond* 344. 3 Inst. 146. 1 Salk. 193. *Stiles* 209, 223, 353. 4 Inst. 65, 172. 372. Pl. 13.

And after, the Chief Justice and one other¹⁴ were of Opinion for the Action, but the third was strenuously against it; and beside the Cases cited, he rely'd much on the Case of *Naylor and Ash*, *Stiles* 223. But the Point

F was

was not absolutely resolved, for it was thought worthy to be determined in the Exchequer-Chamber.

Read *versus* Jones.

Pasch. 3 Jac. 2. Rot. 544. C. B.

fo. 166.
On the Stat'
8 El. c. 2. for
an Arrest in
the Name of
another with-
out his Con-
sent.

THE Declaration sets forth the Statute and the Penalty and how the same is to be recovered; then the Offence against the Statute, viz. That the Defendant sued out a Capias with an Ac etiam in Debt for 100 l. out of the Common Pleas, and delivered it to the Sheriff, &c. to which the Plaintiff gave Bail, &c. by reason of which Arrest he spent 10 l. and sustained 60 l. Damages, quæ atting' ad 70 l. Therefore prays the Defendant may suffer 6 Months Imprisonment without Bail; ac dicit quod occasione præmiss' Actio accrevit &c. to have treble Damages.

These Exceptions were moved in Arrest of Judgment.

fo. 169.

1. That the Statute 8 El. cap. 2. on which this Action is founded, is misrecited; for the Statute speaks of several Courts particularly, and then says in other Cities and Places, in which Actions of Debt, Trespass, and other personal Actions, &c. And the Declaration is general in any personal Actions, numbring them as Debt, Trespass, &c.

2. That an Attorney is not within the Statute (which as one might very well think should be so above all other Persons) *Causa patet.*

3. That the Action lies not before Conviction, *Cro. Ja. 188. contra.*

4. That

4. That the prosecuting a Writ out of the Court of *Common Pleas*, was not within the Statute of 8 El. and so was the Opinion of the whole Court; and therefore Judgment was given for the Defendant without any Regard to the other Exceptions.

Lies not on this Stat' for suing a Writ out of C. B.

Whitgrave versus Chancey.

Hill. 10 & 11 W. 3. C. B.

IN an *Indebitat'* assumpsit for 100 l. won at Passage, and for 100 l. on Account, the Defendant, as to the second promise, pleads Non assumpsit, and Issue thereupon; and as to the other promise, pleads the Statute against Excessive Gaming, and that he lost the said 100 l. to the Plaintiff and 30 l. to one Woodhouse, at one and the same time and meeting. To which the Plaintiff demurs, and the Defendant joins in the Demurrer.

fo. 180.
Bar by the Stat' against excessive Gaming.

The whole Court was of Opinion, that an *Indebitatus assumpsit* doth not lie for Money won at Play, but there ought to be a Special Declaration, and for that diverse Cases were cited to be so resolved. And as to the special Plea, the Court were of Opinion that 'twas good, according to *Hudson and Mallet's Case*, 3 Keb. 671. But it was said by two of the Judges, that peradventure by Special Pleading a good Replication might be made.

Indebitat' assumpsit lies not for Money won at Play.

fo. 181.
1 Salk. 344.
Pl. 2. and 345.
Pl. 3. 4.

*Baker qui tam &c. versus Duncalfe.**Trin. 5 W. & M. Rot. 685. C. B.*

fo. 193.
Debt on 23
H. 6. c. 8. for
exercising the
Office of Un-
der-Sheriff
for two Years
together.

THE Declaration recites the Statute, and avers, that no Person was inheritable to the Office of Sheriff, and that the Defendant had no Estate in the Office of Under Sheriff; then sets forth the Offence per quod Actio &c. The Defendant pleads in Abatement that he is an Attorney of the Common Pleas. The Plaintiff demurs generally, and demands Judgment for the Debt. The Defendant joins in the Demurrer, and demands Judgment, and that the Plaintiff may be barr'd.

fo. 196.

This Case is reported in 3 Lev. 398. But for Authorities to prove that the Suit is the Suit of the Informer, which are not mentioned in that Book, *vid. Cro. Car. 10. and Hutton 82. Farrington's Case. 3 Inst. 194. Mo. 541. 1 Leon. 119. Stretton and Taylor's Case. Cro. El. 138. Hammond and Griffin's Case. Mo. 594. Agar and Candish's Case. Lutwyche for the Defendant, and Judgment was given for him.*

fo. 197.
Vid. 1 Salk.
218. Pl. 2.

Note, That the Demurrer and Joinder in Demurrer are, as if the Defendant's Plea had been a Plea in Bar, which as it seems ought not to be. But for that *vid. Putt and Nofworthy's Case, 1 Ventr. 135, 136, 137.*

Note also, That by the Statute 23 H. 6. Persons inheritable to the Office of Sheriff at the time of making the said Act, and also such Persons as had Freehold in the Office of Sheriff at the time of making the said Act, and their Under-Sheriffs and Clerks are excepted out of the said Act. And in the Declaration it is averr'd, that the Defendant

never

never had any Estate of Freehold, or any other Estate in the said Office of Under-Sheriff; which is to no purpose: For if the Sheriff himself hath Freehold in his Office, the Under-Sheriff is excepted as his inferior Officer. But *Quære* if there be any need of such Averment; for it can't be easily presumed, that an Estate of Freehold which was in *Esse* at the time of making the said Act of 23 H. 6. hath Continuance to this Day.

Sedgwick versus Richardson.

Entred Mich. 5 W. & M. Rot. 400. C. B.

IN an Action of Debt by an Informer on the Stat' of 31 El. c. 12. the Defendant pleaded Nil debet, and Issue thereupon.

fo. 197.

This Case is reported in 3 Lev. 374. and in such a manner, that at least it may be collected that Judgment was given for the Plaintiff with Costs: For there it is said, that Judgment was stayed till the Plaintiff shewed Cause, and that one Reason of making that Rule was, because 'twas moved by the Defendant's Council that no Costs ought to be given the Plaintiff. And then it is there said, that it was answered by the Plaintiff's Council, that when the Penalty is certain, Damages and Costs ought to be given; but when the Penalty is uncertain, not. And for that, *Smith and Wingate's Case*, 1 Cro. 559. 1 Jones 7. Co. Entr. 163 & 164. *Rolls's 1 Abr.* 579. which is a Mistake, for it should be 574) were cited, and that thereupon Judgment was given for the Plaintiff. But to that it was answered by the Defendant's Council,

fo. 200.
If a Common Inform-
er shall have
Costs.

1 Salk. 206.
Pl. 4.

fo. 201.

that the Books of 1 Cro. 559. 1 Jones 447. and 1 Rolls's Abr. 579. are all one Case, which is for taking of 10 *d.* for a Distress; for by the Statute 1 and 2 Phil. & M. but 4 *d.* ought to be taken. But the chief Reason thereof appears by the Report of the said Case in Jones, viz. because that the Penalty is given to the Party grieved; and as to the Precedent in Co. Entr. 163. that is an Action on the Statute of 13 El. c. 5. in that Case the Moiety of the Forfeiture is given to the Party grieved. And as to the other Precedent, Co. 164. that is in an Action on the Statute 21 H. 8. c. 6. of Mortuaries, and the whole Forfeiture is given to the Party grieved. And for the Defendant, the Case of Eaton and Buntly, 2 Keb. 781, and 788. (which is now reported in 1 Ventr. 133 and 134) was cited; where in an Action on the Statute 17 Car. 2. c. 2. after Verdict for the Plaintiff it was moved in Arrest of Judgment, that no Costs or Damages were to be given to the Plaintiff. And the Case of North and Wingate, and the Precedents in Co. Entr. were cited for that purpose. But it was resolved by the whole Court, that Costs ought not to be given in a popular Action, whether the Forfeiture be certain or not; but where a certain Penalty is given to the Party grieved there he shall have his Costs and Damages. Vid 1 Brownl. 66. King and Law's Case, and Hutt. 22. the same Case. True it is, that in an Action on the Statute of 8 H. 6. of Forcible Entries, the Plaintiff shall recover Costs but the Reason thereof is, because that it is not a Law of Creation, but of Addition for by the Common Law the Plaintiff should recover Damages. Co. 10. 116. *a* and *b*, Pl. 4.

Action on Stat' and Bar per Stat'

fold's Case. *Lutwyche* only was of Council with the Defendant in this Case of *Sedgwick* and *Richardson*. And I always after the Case was moved, till the Report thereof in 3 *Lev.* thought, that the Rule of Court was, that no Costs were given in this Case; but that Report put me upon further Inquiry of the Truth thereof: And to that purpose I viewed the Record thereof, which is entred *Mich. 5 W. & M. Rot. 400.* and not *Trin. 5 W. & M.* as is said in 3 *Lev.* But no Judgment is entred on the Roll, nor is there any Footstep of the Case in point of Costs, to be found in the Remembrance or the Court-Book. But that which gave me full Satisfaction that no Costs were given by the Court, is, that the Defendant himself informed me that very Day, as he had before, some small time after the Debate of the Case, that he had only paid the Penalty (*viz.* the 10 *l.*) in discharge of the Suit against him.


Percival qui tam &c. versus Mitchell.


Hill. 6 W. 3. in C. B.

IN Debt qui tam &c. the Informer declared, that the Defendant had not repaired to Church for 11 Months contra formam Statut' &c. whereby he had forfeited 20 *l.* per Month, &c. amounting to 220 *l.* in three Parts to be divided. The Defendant pleads a former Conviction on an Indictment at the Sessions of Peace by Proclamation, &c. in Bar. Demurrer and Joinder in Demurrer.

There were not any further Proceedings in the Case, after the Joinder in Demurrer. That a Conviction by Proclamation is a Bar to former.

fo. 201.

Debt, qui tam &c. for Recusancy in not coming to Church. 

fo. 208. 

Conviction by Proclamation is a good Bar to an Informer.

Action on Stat' and Bar per Stat'

to an Informer, *vid. Bridgman* 120. 2 Cro. 481. *Lane* 66. *Noy* 117. 11 Rep. 65 and 66. *Cawley of Recusants*, 78 and 79.

Barnaby versus Nandike.

Trin. 9 W. 3. Rot. 1875. C. B.

fo. 208.
Debt, *qui tam* &c. for Recusancy in not coming to Church.

Bar by Judgment against her in an Action brought by another Informer.

IN Debt *qui tam* &c. for 220 l. the Informer declares that the Defendant for 11 Months prox' ante impetrat' brevis scilicet &c. had not repaired to Church, &c. Sed per totum tempus obstinate & voluntarie abstin' contra formam Statuti per quod actio accrevit dicto Domino Regi quam eid' Jacobo ad exigend' dict' 220 l. The Defendant pleads in Bar, that 4 Jan. 8 W. one W. V. sued out another Writ against her for the same Offence, ret' octab' Hill' That the Parties appeared, and the Sheriff return'd a Nichil; That the Informer thereon declared, and demanded the three parts, &c. and had Judgment by non sum informatus; then concludes with proper Averments. The Plaintiff replies, that the Original set forth in the Bar, was not prosecuted within 12 Months after the 11 Months. The Defendant rejoins, and says that the Original issued within the Time limited, and as it ought to have issued. Demurrer and Joinder in Demurrer.

fo. 212.

The sole Question which was debated in this Case was, Whether the Declaration was good or not.

Two Exceptions were taken to it: 1. That it concluded *contra formam Statuti*; whereas it ought to conclude *contra formam Statutor'* because the Action is founded on several Statutes; and for that were cited

3 Cro. 750. *Dingley and Moore's Case*. 2 Cro.

142. *Broughton's and Moore's Case* in Point, and there *Coke* said it was so adjudged in *Talbot's Case*.

To that it was answered, that the Precedents are as the Declaration is here, *Herne* 509. *Co. Entr.* 569. *b. Winch* 522, 523, 524, 526, 527, and 660. 1 *Brownl.* 135.

The other Exception was, That the Declaration was too general, and not according to the Precedents, by which it is shewn how the 20 *l. per Month* is forfeited, *viz.* so much to the King, so much to the Informer, and so much to the Poor. 1 *Salk.* 383.
Pl. 34.

But to that it was answered, that the Precedents are both Ways, and the Court will take notice how the Forfeiture is to be distributed.

This Case was argued *Mich. 9 W.* by *Wright* the King's Serjeant for the Plaintiff, and *Girdler* for the Defendant; and *Hill. 9 W.* by *Lutwyche* for the Plaintiff, and *Levinz* for the Defendant; and then *Cur' advisare vult*; and what Event it had, I cannot by any means discover.

But the Case of *West* in *Owen* 135. seems to be a strong Case, that the Declaration ought to conclude *contra formam Statutor'* I have caus'd the Court-Book and the Remembrance to be searched, and it doth not appear thereby that any Judgment was ever given in the Case; and I have so often lost my Labour in the search of the Rolls of Court, I was discouraged to search if any Judgment was entred on the Roll.

Belasyse

*Belasyse versus Burbridge & al'**Trin. 7 W. 3. Rot. 684. C. B.*

fo. 213.
Action on
the Stat' 2 W.
& M. for re-
scuing a Di-
strefs.

THE Plaintiff declares, that on the 20th of March 1692, apud Holme in Com' Nott' he demised a House, &c. in H. N. & B. in Com' præd' to Robinson habend' for a Year, & sic de anno in ann' &c. virtute cujus Robinson entred and was possessed, Et sic inde possessionar' the Plaintiff 20 Decemb' 1694 in & super dimis' præmils' 5 quarter' Hord' & 5 quarter' Siligin' distreined for a Year and a half's Rent, ending at, &c. and the same in a Barn parcell' dimis' præmils' detain'd. That the Defendants grana præd' in horreo præd' apud Holme præd' vi & arm' recusser'

To this Declaration the Defendant plead-
ed *Non culp'* and the Issue was tried at *Notting-
ham* Affizes, and found for the Plaintiff a-
gainst all the Defendants except *Burbridge*;
and after this Verdict it was moved in Arrest
of Judgment,

fo. 214.
If a meer
Stranger re-
scues Goods
taken for
Rent-Arrear,
against the
Stat' 2 W. &
M.'tis not ne-
cessary to give
him Notice of
the Distrefs,
which the
Stat' requires
to be given
to the true
Owner.

1. That the Statute 2 W. & M. which gives
Power to sell a Distrefs not replevied within
five Days, says, that the Party who distreins
may sell, &c. after Notice given to the
Owner of the Distrefs, or Notice left at the
Owner's Dwelling house; and in this Decla-
ration no Notice is alledged. But to that it
was answered, and so resolved by the Court,
that forasmuch as the Defendants are Tort
Feasors, no Notice is requisite: For the In-
tent of the Act was, that the Owner of the
Goods distreined should have Notice to bring
his Replevin; but it doth not signifie any
thing to the Defendants who are Tort Fea-
sors

fors, whether Notice was given or not, and so no Notice requisite.

2. That it doth not appear that the Corn distreined was *unthrash'd*; and if not, it is not distreinable within the said Act, which gives Power to distrein *Sheaves or Cocks of Corn, loose or in the Straw*: so that the Act provides only for Corn unthrash'd. *Sed non allocatur*; for whether the Corn is thrash'd or not, it is distreinable. Corn is distreinable, whether thrash'd or not.

3. The Plaintiff declares, that the Distress was taken for Rent reserved on a Lease for one Year, & *sic de anno in annum quamdiu ambobus partibus placuerit*; so that this Lease was determined at the End of one Year, and consequently the Plaintiff could not distrein for the Rent of that Year and half a Year more. But it was answered, and so agreed by the Court, that this Lease was a good Lease for two Years at the least, according to 6 Co. 35. *b.* the Bishop of Bath's Case. 3 Cro. 775. *A-*gard and King's Case. 1 Sid. 423. *Gostwick's* Case. 1 Mo. Rep. 3. Salk. 413, 414.
A Lease for a Year, & sic de anno in annum is good for 2 Years at least.

4. That there was no Venue laid where the Rescous was made. But it was answered, and so agreed by the Court, that in this Case there is a sufficient Allegation that the Rescous was made at *Holme*; for the Declaration says, that the Corn was impounded in a Barn *parcell' dimiss' præmissor'* and that the Defendant at *Holme* aforesaid rescoused it out of the said Barn; so that the said Barn shall be intended to be at *Holme*, otherwise the Defendant could not rescue the Corn at *Holme* out of the said Barn. fo. 215.
What shall be intended a good Venue in Rescous.

5. It was objected, that altho' the Venue be admitted to be laid at *Holme*, yet it is not good; for the Venue ought to come from *Holme*,

Holme, Northmuskham, and Bathley, where the Lands lie. But it was answered and resolved, that the Venue is well laid ; for this Action is founded on a Tort, and not on the Right of Land in 3 of the Land ; and the Demise, &c. is only an Inducement to the Action, and the Tort is the principal Matter, and therefore the Venue shall be laid where the Tort is done ; and with this Difference they agreed. 3 Cro. Sidenham versus Robins. Noy 9. Banning's Case. 3 Cro. 427. Bragg versus Bauning, and 571. Leed versus Shackerly. Hob. 305. Clerk versus Wood. Hut. 39. And afterwards in Hillary Term, 8 W. 3. Judgment was given for the Plaintiff. Lutwyche for the Plaintiff, and Wright the King's Serjeant for the Defendant.

In an Action for a Rescous, on a Demise of Land in 3 Villages, and the Rescous laid in one of 'em, the Venue shall come from the Place where the Rescous is supposed.

Ridley & al' versus Bell.

Trin. 13 W. 3. Rot. 406. C. B.

fo. 215.
Action on the Statute of 5 & 6 W. & M. and 9 & 10 W. brought against the Defendant as Collector of the Salt-Duty.

THE Plaintiffs declare, that they entred for Exportation 17000 Codfish ; That they were exported, and Oath made that they were English taken ; That the then Collector made out a Deben-ture, to certify, &c. whereof Notice was given to the Defendant ; And then set forth how the Debt became due, and that they requested the Defendant to pay it within 30 Days, who had sufficient Money then in his Hands, and also that they requested him to pay after the 30 Days. The Defendant pleads Nil debet. The Jury bring in a Special Verdict, and thereby find all the parts of the Declaration, save the Request after the 30 Days ; but say, that there was no Evidence given that the Fish were English taken, &c. save the Certificate, &c.

In

In this Case, by the Opinion of the whole Court in *Hillary Term*, *Anno primo Annæ Reginae*, Judgment was given for the Plaintiffs. *Hooke* and *Carthew* for the Plaintiffs, *Prat* and *Lutwyche* for the Defendant; but the Case was never argued by *Lutwyche*.

Note, That this Action is founded on two Statutes, one made 5 & 6 *W. & M.* by which (Pag. 128 and 134) 15 *s. per Cent.* is given to the Exporter of Codfish, &c. the other Act is made 9 & 10 *W. 3.* and by that (Pag. 726) 35 *s.* is given to the Exporter for every 100 *l.* of Codfish, &c. But by the former Act the Duty is to commence from the 25th of *March*, 1694. and to continue to the 17th of *March*, 1697. And the Codfish for which the Plaintiffs pray the Allowance, was exported the 8th of *February* 1700. and so after the Continuance of the said former Act, as it seem'd *prima facie*. But it is to be noted, that by another Act made 7 & 8 *W. 3.* pag. 629. the Duty on Salt is made perpetual; and this Act was made at a Parliament *ten't* 22 *Novemb'* 1695. and so during the Continuance of the Act of the 5 & 6 *W. & M.* And the said Act of the 7 & 8, recites the Statute of the 5 & 6 *W. & M.* and thereby it is enacted, that the said Act of the 5 & 6, and every Article, &c. in it, shall continue for ever in full Force to all Intents and Purposes, as if it had been particularly recited and enacted in the Body of the Act; and then it is all one as if the former Act had been perpetual at first, according to *Dingley* and *Moore's* Case, 3 *Cro.* 750. and *West's* Case, *Owen* 134.

If a Stat' is made to continue to such a Day, and before the Day is made perpetual, it is all one as if it had been made perpetual at first.

ASSUMPSIT.

Stinton *versus* Yates.

Intr. Trin. 1 Jac. 2. Rot. 344. C. B.

fo. 222.
Assumpsit
concerning
the Maintenance of a
Bastard Child.

THE Plaintiff declares, quod cum quidam R. Y. the Defendant's Son, carnalem cognition' obtinuisset de corpore cujusdam J. S. the Plaintiff's Daughter, & ipsam puero procreasset, *that she was afterwards delivered; That the Plaintiff pro relevio suo intended to prosecute the said R. Y.* Et præd' Maria desiderans compositionem &c. quoddam colloquium habuit *such a Day between her and the Plaintiff; quod si Quer' assumeret custodire infantem præd' for 5 or 6 Years, and not prosecute her Son, then she would pay the Plaintiff 10 l. whether the Child lived or died, viz. 1 s. in Hand, 4 l. 19 s. such a Day, and 5 l. Residue by 20 s. a Year, which 5 l. she would secure by Bond.* Et post expirationem of the said 5 or 6 Years, she would maintain the Child her self. Super quo the Defendant, in consideration that the Plaintiff had promised to perform all on his part, promised to perform all on her Part, Et in facto dicit, *that he hath maintained the Child hucusq; &c. and hath not prosecuted her Son; That the Defendant hath not paid the 4 l. 19 s. nor secured, &c. licet adinde requisit' &c. Demurrer and Joinder in Demurrer.*

fo. 224.

An Exception was taken to this Declaration, that it is not aver'd thereby that he had promised he would maintain the Child for five or six Years, and that is a Condition precedent as to the whole Agreement; and perhaps

perhaps the Plaintiff would not oblige himself at that present time, till he had considered further thereof, and then to declare his Mind, and thereby to make the Agreement absolute, which before was conditional. *Sed non allocatur exceptio*; for it was said by the Court, that the mutual Promise of the Plaintiff mentioned to be *in consideratione*, &c. was a sufficient Averment to that purpose, without any other Averment, and the Plaintiff had Judgment. *Lutwyche* for the Defendant.

Johnson & Ux' versus Mapletost.

Hil. 2 & 3 Ja. 2. Rot. 1465. C. B.

THE Plaintiffs declare on an Indebitatus assumpsit, for Money lent the Defendant by the Plaintiff Jane dum sola, and lay a special Request before Marriage and another after. The Defendant pleads *touts temps prist*, and a Tender before the Action brought. To which the Plaintiffs demur, for that he had pleaded it after a Request and Imparlance, and the Defendant joins in the Demurrer.

fo. 225.

Judgment was given for the Plaintiffs, because it appeared that the Tender was after two Requests to pay the Money; for one Request was made by the Plaintiff *J. 2 Novemb. 1 Ja. 1.* when sole, the other after Marriage, *viz. 1 Decemb. 1 Ja. 2.* and the Tender was made *1 May, 2 Ja. 2.*

fo. 227.

Dimock

*Dimock versus Wetheral.**Trin. 3 Ja. 2. C. B. Rot. 1111.*

Action in
the C. B. by
way of *Que-*
ritur, is ill.

THE Plaintiff as Administrator of C. D. per J. G. prox' amicum queritur de C. W. un' Attorn' Cur' Dom' Reg' de Banco hic presen' hic in Cur' &c. To which Declaration the Defendant demurred, and the Plaintiff joined in Demurrer.

fo. 228.

Judgment was given against the Plaintiff because all Actions which are in C. B. are brought by Original Writ, or Original Bill, or by Attachment of Privilege, and the Action here is by way of *Queritur*.

*Coninsby versus Rodd.**Mich. 3 J. 2. Rot. 833. C. B.*

fo. 229.
Declaration
on a special
Agreement
concerning
the Tithes of
G. Meadow.

THE Plaintiff declares, that 1 Decemb' 30 Car. 2. quoddam colloquium habit' fuit between the Defendant and him concerning the Tithes of G. Meadow, whereon the Plaintiff affirmed he was the Proprietor of them, which the Defendant denied. Et sup' inde agreat' fuit between them, that the Defendant should continue the Collection of the Tithes to his own Use; and that if the Plaintiff should recover, in any Action to be brought by him against the Defendant, for any Tithes of the said Meadow, then the Defendant should pay him 20 s. per Ann' for every Year he (the Defendant) should collect them to his own Use. That the Defendant in consideration the Plaintiff had promised to perform all on his part, promised to perform all on his (the Defendant's) part. The Plain-

tiff

*Plaintiff in fact*o dicit, *that afterwards*, scil' *Termino Mich' A' D' Reg' nunc primo in Cur' C. B. per breve originale, he impleaded the Defendant pro captione & abcaratione of the Tithes of the said Meadow; taliterque process' fuit &c. that he recovered, &c. that the Defendant hath collected the said Tithes to his own Use per spatium sex annor' prox' post confection' agreementi præd' The Plaintiff also declares, that the Defendant eodem die in Consideration the Plaintiff would permit him to collect and receive the Tithes to his own Use, promised to pay him 20 s. pro quolibet Anno &c. And the Plaintiff in fact*o dicit, *that he permitted the Defendant to collect and receive them from the said Day for six Years. The Plaintiff further declares, that the Defendant 1 Aug. Anno nunc Reg' secundo &c. in Consideration that the Plaintiff had permitted him, &c. promised to pay him 20 s. pro quolibet anno præd' sex annor' &c.*

One Exception only was taken to the third Declaration, which was, that the Promise was to do a collateral Act, where there was no Duty before; but the Duty commenced with the Promise, and therefore a special Request ought to be alledged; and for that he cited *Osbaston and Garton's Case*, 3 Cro. 91. *Stiles* 49. *Parmiter's Case*, 1 Brownl. 13. *Gore v. Colthrop*. But to that it was answered by the Court, that true it is when an *Assumpsit* is to do a collateral Thing on Request, a special Request ought to be alledg'd; otherwise, if the thing be not to be done on Request. So is *Hill and Wade's Case*, 2 Cro. 523. *Astridge and Owen's Case*, 3 Leon. 200. *Winch.* 102 and 103. *Jones* 56. *Love v. Kirby*, and *Beck and Mithwold's Case*. *Jones* 85. Cro. Car. 85. *Palmer and Knight's Case*, and other

fo. 231.

Where a special Request is necessary, and where not.

Books. And the Reason which those Books giue for it, is, that the Request is Parcel of the Agreement. See also 2 *Ventr.* 74 and 75. Also in this Case the Mony is to be paid at certain times, *viz. pro quolibet Anno &c.* which is all one as if it had been yearly, *id est*, at the end of each Year of the said six Years, 20 s.

The Exception was over-rul'd, but by Consent the Defendant had leave to plead over on Payment of Costs.

Ewers versus Benchkin.

Mich. 4 Jac. 2. Rot. 388. C.B.

Assumpsit against the Acceptor of a Bill of Exchange.

fo. 231.

THE Plaintiff declar'd on a Custom, inter Mercatores &c. apud London' residen' & Commercium haben' viz. quod si aliquis Mercator &c. Commercium habens fecerit aliquam billam excambii secundum usum Mercator' & eandem alicui al' mercatori &c. in London' præd' residen' & Commercium haben' direxit & per eandem billam &c. and that if the Person to whom it shall be directed shall accept it, he was liable to pay it secundum acceptationem suam, That one T. K. such a Day, apud Sandwich in hoc Regno Angliæ residen' secundum &c. drew a Bill of Exchange on the Defendant tunc apud London' præd' residen' &c. & per eandem requisivit eum solvere prefat' J. Ewers summam 8 l. which Bill the Defendant such a Day accepted ratione quor' quidem acceptation' & consuetudinis onerabilis devenit ad solvend' &c. secundum acceptationem suam, and in Consideration thereof promised, &c.

To this Declaration the Defendant demurred, and the Plaintiff join'd in Demurrer.

One

One Exception was taken to the Declaration, because the Custom is laid at *London* and the Bill is drawn by one at *Sandwich*; so that the Custom doth not extend to this Case; *sed non allocatur*; yet the Custom it self is alledged to be, that if any Person (without Restraint to the Inhabitants of *London*) draws a Bill, &c. that the Acceptor shall be liable.

fo. 233.

Another Exception was, that the Custom is that the Acceptor is to pay the Bill *Secundum acceptationem suam*; and the Bill doth not mention any time, nor is it alledg'd that the Defendant had accepted the Bill to pay it immediately, or at any time certain, and then it might be that the time to pay it was not passed before the Action brought, and that was held a good Exception; but by Consent the Plaintiff was to amend his Declaration.

Vide 1 Salk.
127. pl. 7.
129. pl. 11.

Stanhope versus Butter.

Hill. 9 W. 3. C. B.

THE Plaintiff declared on an Agreement concerning the Purchase of a Messuage, &c. by the Defendant of him, and also declared that in Consideration he had sold the Defendant a Messuage, &c. for 135 l. *super se assumpsit* &c. And likewise declared on an *Indebit' assumpsit* in al' 135 l. *pro precio cujusdam al' Messuag' &c.*

Bill against
an Attorney.
fo. 233.

On *non assumpsit* pleaded, and Issue thereon, Verdict was for the Plaintiff, and entire Damage given, and thereupon it was moved in Arrest of Judgment, that in the second Narr', it is not alledged *quod Defend' super se assumpsit*, but only *super se assumpsit* without the

fo. 234.
Super se Assumpsit (omitting the Word *Defend'*) in the 2d Narr', yet good.
1 Salk. 26. pl.

fo. 235.

Exposition
of the Words
Cumque etiam.

Word *Defend'* and for that the Case of *Hastwood* and *Mansfield*, 2 *Ventr.* 196. was cited, where in Debt on a Charter-Party the Master obliged himself in 150 l. to the Merchant to perform Covenants, & *ad Performance Convention' ex parte dicti Mercatoris obligasset dicto Magistro*, without saying *quod ipse prae Mercator obligasset &c.* And on Demurrer to the Declaration in Debt on this Charter-Party brought by the Master, Judgment was given against him, against the Opinion of *Ventris* Justice. But *quære* of that Resolution for the Case between *Tretheway* and *Ellesden* in the same Book 141. And the Case of *Hilton* and *Smith* in this Book seem to be strong Cases for the Opinion of *Ventris* Justice; but that notwithstanding Judgment in the principal Case was given for the Plaintiff against the Opinion of *Blencoe* Justice; and it was said by the three other Justices, that the Words *Cumque etiam* would bear the Construction of the Word *Moreover*, and then that Word *Moreover* would conjoin the second Promise to the Person rightly named in the first Promise; and by *Treby* Chief Justice, the not naming the Defendant in the second Promise was aided by the Statute of 16 and 17 *Car. 2. cap. 8. of Feofails*, the Defendant being once before rightly named, and the Plaintiff had Judgment.

Remington *versus* Taylor.

Trin. 13 W. 3. Rot. 406. C. B.

fo. 235.

AN *Action on the Case for Household Stuff sold by the Plaintiff to the Defendant, in which the Plaintiff declares several ways.*

After Judgment by Default and a Writ of Inquiry of Damages returned, these Exceptions were taken in Arrest of Judgment: fo. 237.

1. That there is no Place alledged where the second Promise was made.

To which it was answer'd, That the Judgment in this Case being on a *Nil dicit*, the want of a Venue was not now material; for Inquiry was to be of nothing but the Damages, whereof Inquiry might be by any Jurors of the County, *Cro. El.* 880. *Dame Shandis Case*; *Et non allocatur exceptio.* Ref. In what Case a Venue is not necessary.

2. That no Consideration was alledg'd for the second Promise.

To which it was answer'd, That there was a Consideration apparent in it self, the Contract being *pro bonis vendit*. *Ideo non allocatur exceptio.* Ref.

3. It was excepted, that it is not alledg'd that the Promise was made by any Person. fo. 238.

To which it was answer'd, That it was impossible to be intended that any other Person but the Defendant had made the Promise, for there are not any Persons mention'd before but the Plaintiff and Defendant, and the Promise is alledg'd to be made to the Plaintiff; so of Necessity it is to be intended that the Defendant made the Promise. *Et non allocatur exceptio.* And the Case of *Simball and Cooke*, 2 *Keb.* 715. was cited by *Powel Justice*, which is a Case in point. Ref. When the Omission of a Name in a Narr' on an *Assumpsit* will not hurt. v. ante 235.

Divers other Exceptions were taken for false and incongruous *Latin*; but the Court did not much regard them. The Plaintiff had Judgment: *Lutwyche* for the Plaintiff, *Hooke* for the Defendant.

Morris versus Coles.

fo. 238.

IN an *Indebitat'* assumpsit for several Sums on several Promises, the Defendant after Impar-
lance pleads that the several Sums, &c. amount to 66 l. and as to 64 l. 7 s. pleads *Non assumpsit*, and as to the Residue, says, that the several Promises, &c. are one and the same Contract, and then pleads a Tender thereof.

fo. 239.
Tender plea-
ded after Im-
parlance is
ill.

The Plaintiff demurs generally, and the Defendant joins in Demurrer, and it was re-
solved that the Plea was ill by reason of Im-
parlance, and also by reason the Plea was in-
certain for which of the Promises the Money
was tender'd. *Raymond* 449. Note, this Case
was adjudg'd in *Mich. 12 W. 3.*

*Swinburn versus Ogle.**Intr. Trin. 12 W. 3. Rot. 1671. C. B.*

Case for
Goods sold.
fo. 239.

IN an Action on the Case the Plaintiff declares
first on a Quantum meruit for Goods sold, and
then on an *Indebitat'* assumpsit for Goods sold;
whereunto the Defendant pleads *infra ætatem*.
The Plaintiff replies *protestando*, that the Defen-
dant tempore quo &c. was not *infra ætatem*,
that part of the Goods was necessary Apparel, and the
residue necessary Food. The Defendant rejoins and
maintains his Bar. The Plaintiff demurs because
the Matters are jointly put in Issue, whereas they
ought to be put in Issue separately.

fo. 241.
What ought
to come in of
the other side.

An Exception was taken to the Rejoin-
der, viz. That the Defendant had not al-
leged that the Goods (or any part thereof)
were not for Necessaries. 1 *Mod. Rep.* 146.
Cart.

Cart. Rep. 221. 1 Saund. 312. sed non allocatur; for if any part of the Goods were for Necessaries, it ought to be shewn on the other side.

2. Another Exception was, That the Matters in the Rejoinder shou'd be put in issue severally, which is one of the Causes of Demurrer: *sed non allocatur*. And for that see *Taylor and Hill's Case, Cro. Car. 219. 2 Cro. 544. Heath and Dauntley's Case. 1 Sid. 332, 333. Noy 132. Denton's Case. Dier 326.*

3. Then an Exception was taken to the Replication, because the Plaintiff had not distinguished to which of the Promises in the Declaration he applied the Goods which were for necessary Apparel, nor to which the Goods which were for necessary Aliment. And it was allowed to be a good Exception. And for that *vid. 1 Sid. 338. Rigby and Buck-ley's Case, Popbam 208. Sparrow and Sherwood's Case. Thwaite and Spencer's Case. 5 W. & M. B. R. in Assumpsit on an Indebitat' and another on a Quantum meruit, as to all the Damages but 4 l. the Defendant pleaded non assumpsit*; and as to the 4 l. that he tender'd it to the Plaintiff, &c. and on Demur adjudged against him, because he had not distinguish'd to which Promise he had pleaded the Tender, and the same Matter in Effect was in a Case in C. B. to the same purpose between *Hirst and White, Trin. 5 W. & M.* the Defendant in this Case in *Mich. 12 W. 3.* had Judgment by the Opinion of the whole Court. *Lutwyche* for the Defendant.

If the Plaintiff, to *infra etatem* pleaded, replies, that Part was for Necessaries, he ought to shew what Part in particular.

fo. 242.

*Gery versus Coke.**Trin. 4 W. & M. Rot. 323. C. B.*

Action on
the Case a-
gainst an Ex-
ecutor.

fo. 242.

fo. 244.

THE Plaintiff declares on an *Indebitatus* *assumpsit* for 50 l. received by the Testator to the Plaintiff's Use. The Defendant pleads *Non assumpsit infra sex annos*. Replicat. That the Plaintiff was within Age, &c. and that within Six Years after his full Age he prosecuted an Original. The Defendant in his Rejoind' repeats the Bar, and says, That the Stat. of Limitations doth not give any Liberty to bring an Action within Six Years after full Age. The Plaintiff demurs, because the Rejoinder contains a vain Repetition of the Bar. And the Defendant joins in the Demurrer.

This Case, as to matter of Law, is the same in Effect with *Chandler and Vilet's Case*, 2 Saund. 120. But there is some Difference in the Pleading. In this Case the Plaintiff had Judgment. *Lutwyche* for the Plaintiff.

*John Thorpe versus Richard Thorpe.**Hil. 8 W. 3. Rot. 1667.*

This Case
is reported in
1 Salk. 171.
fo. 245.

THE Plaintiff declares on mutual Promises on an Agreement, whereby the Plaintiff agreed to release to the Defendant his Equity of Redemption in two Closes, in Consideration whereof the Defendant promised to pay 7 l. &c. then avers that he hath performed his part, &c. and afterwards declares for 5 l. 15 s. for releasing his Equity of Redemption. The Defendant pleads a Release in Bar. The Plaintiff craves Oyer of the Release, and (it appearing to be a Release of his Equity of Redemption)

on) demurs, and the Defendant joins in the Demurrer.

The Objection that was made in this Case was, That this Action was released ; but to that it was answered by the Plaintiff's Council, That the Release was a Consideration preceding the Promise, and the Ground and Foundation of the Action, and till that was made the Plaintiff had no Cause of Action vested in him ; and because also it could not be the Intent of the Parties that the Release shou'd be a Discharge of the Duty which was to be created by it ; and for that the Case of *Potter and Phillips* (*Palmer* 218. 2 *Cro.* 627.) was cited, where the Defendant in Consideration that the Plaintiff wou'd allow to the Defendant 7 *l.* Rent due to him on a Demise, and wou'd make to him a Letter of Attorney to sue a Bond made to the Plaintiff, and that he wou'd release to the Defendant all Actions and Demands, the Defendant promised the Plaintiff, that if he did not receive the said Debt, that he wou'd pay it the Plaintiff, and then he avers particularly the performance of his part, &c. After Verdict for the Plaintiff on *Non assumpsit* pleaded, 'twas moved in Arrest of Judgment, that by the Release the Promise was discharged ; but it was resolved to the contrary, *quia per Cur'* the Release it self is part of the Consideration which induces the Promise, and the Intent of the Parties can't be to extinguish their mutual Contract. Also the Promise is to do a future Act, which cannot be released by a Release of all Actions or Demands ; but by *Houghton* a Release of all Promises might be a Release presently, *Hoe's Case*, *Co.* 5. and other Cases were cited to the same purpose. *vid.* *Rolls* 2 *Abr.*

fo. 249.
Condit' Precedent.

2 *Abr.* 407. numb. 22. *Smith* and *Stafford's* Case. *Hob.* 216. 2 *Cro.* 57. *Clarke* versus *Thompson*. And of this Opinion was the whole Court, and the Plaintiff had Judgment. *Lutwyche* for the Plaintiff.

But a Writ of Error was brought in *B. R.* which *Intrat. Pasch.* 12 *W.* 3. *Rot.* 253. in which the Chief Justice *Holt*, after several Arguments, deliver'd the Resolution of the Court to this Effect:

We are all of Opinion, that the Judgment given in *C. B.* ought to be affirmed; for we hold that the Defendant's Promise is not released. It was urged at the Bar, that if the Plaintiff might have an Action on the Defendant's Promise before the making of the Release, that then the Release will be a Bar to the Plaintiff: And I agree the Consequence if it should be so. But in this Case the Plaintiff could not have an Action before the Release made; for the Release of the Equity of Redemption, is that which entitles the Plaintiff to his Action for the 7*l*. A Release of all Demands will not release a Covenant not broken; and so in 2 *Cro.* 170. *Hancock* and *Field's* Case, and 5 *Co.* 70. *Hoe's* Case.

A Release of all Demands will not release a Covenant not broke.

1 *Salk.* 112, 113. It was urged, to prove that the Plaintiff might have an Action before making the Release, that there are mutual Promises, and in that Case there is no need to alledge Performance on the Plaintiff's Part. That is generally true; but then it depends on the Words of the Agreement, whether it shall be so or not; and certainly one may make the Agreement so, that one shall not be obliged to part with his Money till he hath a Consideration for it.

In this Case the Agreement is, that the Plaintiff shall release the Equity of Redemption, in Consideration whereof the Defendant is to pay 7 *l.* so that the making of the Release is a Condition precedent to the Payment of the Money.

The Books differ in this Point, and therefore it is necessary that it should be settled.

I agree the Case of *Nichols* and *Rainbred*, *Hob.* 88. to be good Law: There, in Consideration that *Nichols* promised to deliver to the Defendant a Cow, the Defendant promised to deliver to him 50 *s.* it was adjudged that the Plaintiff need not aver the Delivery of the Cow, because there was Promise for Promise.

15 *H.* 7. 10. b. is full in point on the Difference which I have taken on the Words of the Agreement: One covenants to serve me for a Year, and I covenant to give him 20 *l.* he may sue me for the 20 *l.* although he doth not serve me; but it wou'd be otherwise if the Agreement be that he shou'd have 20 *l.* for to serve me a Year. *Vide ibid.* another Case on the same Difference.

There is no Reason that one shou'd be compell'd to pay Money for the Performance of an Act before that the Act be done; but here the following Differences are to be noted:

1. If by the Agreement a certain Day shall be appointed for Payment of the Money, and this Day is to happen before that the Act can be performed for which the Money is to be paid; there, altho' the Words be that one shall pay so much for the Performance of such an Act by the other, yet the Party may have an Action for the Money after the Day appointed

Where a Day is fixt and that happens before the Act can be performed.

fo. 251.
Esquires.

appointed for payment thereof, and before that the Act be done. On this Reason is the Judgment in the Case of Sir *Ralph Pool* and Sir *Richard Golcheſter*, 48 E. 3. 2, 3. cited in *Ugh-tred's Case*, 7 Co. 10. b. where it is briefly put. One Covenants to ſerve the other in the Wars of *France* with three Esquires, and the other covenants for it to pay 42 Marks; an Action lies before the Service performed. But in the Case at large as it is put in the ſaid Book of 48 E. 3. the Agreement was, that the Moiety of the Money ſhou'd be paid in *Eng-land* before the Service in *France*, and therefore it warrants the Difference that I have taken. So in *Large and Cheſhire's Case*, 1 Ventr. 147. One promiſes, in conſideration that the other wou'd permit him to enjoy ſuch Lands for ſeven Years, that he wou'd pay him 20 l. *pro quolibet anno*; an Action lies after each Year. On the ſame Reason is the Case of *Pordage and Cole*, 1 Saund. 319. where it was agreed that *Cole* ſhou'd give to *Pordage* 500 l. for all his Land, the Money is to be paid a Week after *Midſummer*, and adjudged that an Action lay for the Money before the Land is conveyed.

Where a Day is fixt which happens after the Conſideration is to be performed.

Another Difference to be obſerved is, that if a certain Day ſhould be appointed by the Agreement, yet if that Day happens after that the Conſideration is to be performed, there ought to be an Averment that the Service is done, *Dyer* 76. If a Contract be made between two, that for the Hawk of one to be deliver'd at ſuch a Day the other ſhall have his Horſe at *Chriſtmas*, if the Hawk be not deliver'd at the Day, the other ſhall not have an Action for the Horſe.

The Case of *Russel and Ward*, 1 *Jones* 218. is intricately reported; but if it be well considered it will prove this Difference, and so will *Dyer* 76. Pl. 30.

I confess, that that which the Lord Coke saith in *Ughtred's Case*, hath occasion'd divers Opinions in the Books, which seem to be contrary, and to which I will give an Answer.

In 1 *Rolls Abr.* 414, 415. there are several Cases put together to the same purpose: the first is the Case of *Gurnell and Clarke* in C. B. where one covenants with the other to pay him 147 *l.* *pro tota transfretatione* of certain Freight, and it was adjudged that an Action lay for the Money without an Averment of the Performance of the other part, &c. But in that Case it doth not appear whether the Money was to be paid before the Voyage or after; but the true Answer to that Case is, that a Writ of Error was brought on that Judgment, and the Court of B. R. held that Judgment to be erroneous, as appears 1 *Bulst.* 167.

The Case of *Eaton and Dixon*, as it is put in 1 *Rolls Abr.* 415. seems an Authority in point against me. A. Covenants in the behalf of B. that B. for the Considerations after mention'd shall convey Lands to C. and C. covenants *pro Considerationibus prædict.* to pay 160 *l.* to B. But that Case doth not come up to the Case in question; for first there is an exprefs Covenant that B. for the Consideration after mentioned shou'd convey to C. then C. covenants for the Consideration aforesaid (and its not said for the Conveyance of the Land) to pay the Money, which is
to

to be intended in Consideration of the Covenant aforesaid for conveying the Land.

In the same *Fol.* there is a Case in point between *Vivian* and *Shipping*. An Award was made between *A.* and *B.* that *A.* should pay to *B.* 10 *l.* and *in consideratione inde*, *B.* should enter into a Bond to *A.* to release all his Right to certain Lands. *B.* is bound to enter into an Obligation, tho' *A.* doth not pay him the 10 *l.* and that by the Opinion of *Jones* and *Berkley* against *Croke*. I give this Answer to that Case, *viz.* *Rolls* says, that it was held to the contrary *Mich. 10 Car. B. R.* But a full Answer to it is, that he had mistaken in the Report thereof, and the Judgment was directly contrary, as appears 1 *Cro. 384.* where *Jones* and *Berkley* against *Croke* held, that the Payment of the 10 *l.* is a Condition precedent : And there was no such Point in *Hayes* and *Hayes* Case, as *Rolls* says (in *Vivian* and *Shipping's* Case) there was. The Case is reported at large in 1 *Cro. 433.* and there is no such point. I have answered the chief Authorities ; there are some Opinions dispersed in the Books, of which I will take notice.

1 *Saund.* 319.
1 *Salk.* 112,
113.

Then as to the Reason of the Thing : The Bargain ought to be performed as it is made, and there is no Reason that a Man should pay for a Thing, if so be he hath it not. Certainly one who pays Money for a Horse, ought to have the Horse. I agree, that two may make an Agreement, one to pay so much and the other to deliver a Horse, if they will, and on such mutual Promises they may have mutual Actions : But then, they may also make the Agreement otherwise, and there is no Reason that a Man should be

com.

compell'd to give Credit *nolens volens*, which would be very hazardous in Bargains.

If one says to another, I will give so much for your Horse, and he agrees to take it ; if nothing more passeth between them, and no Earnest is given, and they depart one from the other, that in point of Evidence is to be taken but as a *nudum Pactum*, and so is *Dyer*, Fo. 30. Pl. 203. and 14 H. 8. 22.

There is a Case in 2 *Mod. Rep.* 33. between *Smith* and *Shalden*. The Plaintiff declares, that in consideration that he had promised to assign his Interest in such a House, the Defendant promised to pay him so much, &c. The Question was, whether the Plaintiff ought to aver that he had assigned his Interest in the House, and it was ruled that he need not make such Averment, on the Authority of *Ughtred's Case*.

They also relied on the Case of *Ware and Chappel*, *Stiles* 186. But that is a different Case ; for there two Acts are to be done, the one of which is not a Reward or Satisfaction for the other ; and therefore I do not think (as *Ellis Justice* in that Case of *Smith* and *Shalden*) that it was a hard, but a plain Case.

fo. 253.

Then in our Case, if the 7 *l.* were not due at the time when the Release was made ; the general Words of the Release will not discharge it.

An Exception was taken to the Declaration, That the Plaintiff had not averr'd that he had released the Equity of Redemption. But the Plaintiff hath averr'd that he hath done all on his Part, which is sufficient in Substance. However, the Defendant, by plead-

pleading the Release, hath admittted and cured that Fault. There are Cases more strong in the Books to this Purpose, 3 H. 6. 8. 9 H. 6. 15, 16. 1 Ventr. 114, and 126, *Barnard versus Mitchell*. And *Vivian and Shipping's Case*, 1 Cro. 384. is in point as to the Declaration. And therefore the Judgment in C. B. was affirmed.

I have reported this Case more at large than other Cases, because it is of great Use in many Cases which frequently happen; but I confess that which is said touching the Writ of Error is but out of the Reports of two other Cases which agree *in omnibus*.

George Saffin & Ux' Executrix of
Sir J. Heron *versus* W. Shaftoe.

Intr. Trin. 12 W. 3. Rot. 1410. C. B.

fo. 254.

IN Case on Assumpsit on several Promises made by the Defendant to the Testator, the Defendant pleads Quod sepeal' Causæ Action' non accrever. nec eor' aliqua accrevit infra sex annos. To which the Plaintiffs reply, that the Testator such a Day sued out an Original against the Defendant in Trespass quare Clausum fregit, ea intentione &c. to declare super Assump' in narratione præd. That the Sheriff return'd nihil, and thereupon a Capias issued, and was continued quousque, &c. The Defendant rejoins, and says that the Testator was dead diu ante prosecutionem brevis original. scil. &c. Absque hoc, &c. The Plaintiffs thereupon surrejoin & pet' Judic' si Defend' contra Record' ill' ad dicend' &c. admitti debeat. Demurrer and Joinder in Demurrer.
Judgment

Judgment was given for the Defendant,
nisi &c. in Easter Term, 13 W. 3.

fo. 255.

Kinsey *versus* H. Hayward, Executor
of J. Hayward.

Trin. 9 W. 3. Rot. 302. C. B.

IN an Action on the Case on several Promises, the Defendant pleads, that the Testator non assumpsit infra sex annos. The Plaintiff replies, that the Intestate within six Years, viz. such a Day, sued out an Original in Trespass quare Clausum fregit, against the Testator, directed to the Sheriff of Dorset, ret' Craft Ascension' prox' sequen' with Intent to declare for the Cause mentioned in the Declaration; That the Testator did not appear, but such a Day died; That the Intestate prosecuted such a Day another Writ in Trespass quare Clausum fregit, against the Defendant, to the same Intent as before; That the Defendant did not appear thereto, and the Intestate such a Day died; That the Plaintiff such a Day sued out an Original in Trespass on the Case, as Administrator, &c. The Defendant appeared thereto, and the Plaintiff thereupon declared ut supra with proper Averments. Demurrer and Joinder in Demurrer.

fo. 256.
Assumpsit by
an Administr'
against an
Executor.

In this Case it was objected by Girdler of Council with the Defendant, that a Writ brought by Journey's Account doth not lie but between the Parties to the same Original, or some of them, as if one of the Plaintiffs or one of the Defendants dies; but in no Case where there is but one Plaintiff or one Defendant, and one or the other dieth; and that no such Writ lieth, but when the first Writ is served and returned on Record

fo. 260.

H

cord

cord ; But in this Case there is not the same Plaintiff, or the same Defendant, or the same Writ, or the same County, or the same Cause of Action ; and also it doth not appear that the first Writ was ever returned of Record.

Although a Writ can't be said to be brought by *Journey's Account*, yet it may be within the last Proviso of 21 *Ja. 1. c. 16.*

But to all that it was answered and resolved by the Court, that the Case of *Journey's Account* (which was admitted to be good Law) was not material to the Case here, as this Case is ; for they were of Opinion, that this Case was within the Equity of the last Proviso in the Act of the 21 *Ja. 1. c. 16.* And the Body of the Act speaks only of the bringing of the Action ; and an Action may be continued, altho' the first Writ is not, 1 *Rolls Abr. 537.* And these Cases were cited, that this Statute hath been taken by Equity, viz. 2 *Saund. 152.* 2 *Mod. Rep. 70, 71.* *Cro. Car. 245.* *Swayn & al' v. Stephens* ; and the rather in this Case where the first Writ abated by Death. And by the Chief Justice, the bringing the first Writ by the Intestate within six Years, did put the Case out of the Statute of Limitation ; as in Case where one enters to avoid a Fine, and the Case is not like to the Case of *Journey's Account*, where the first Writ ought to be continued till the bringing of the second Writ, because that is to bind Assets, which were at the time of the bringing the first Writ, or to avoid a Counter-Plea, or the like. And by one of

Where 'tis not necessary to aver, that the first Writ was serv'd, &c.

the Judges, it was not necessary to aver that the first Writ was serv'd or return'd, &c. for it shall be intended, if the contrary be not shewn of the other side, especially it being alledged, that the first Writ abated by the Death of the Intestate.

Another

Another Exception was in this Case, that an Original Writ of Trespass *quare clausum fregit* (especially being brought in another County) would not support a Declaration in *Assumpsit*. But the Exception was disallow'd, because the Course of the Court was so : And the Plaintiff had Judgment by the Opinion of three Judges against the Opinion of *Blencow* Justice, who was of Opinion against the Plaintiff for the Reasons before shewn by the Defendant's Council. *Levinz* and *Lutwyche* were of Council with the Plaintiff. But a Writ of Error was brought, and the Judgment reversed (and that Judgment was affirmed in Parliament) chiefly (as I am credibly informed) because admitting that a *Clausum fregit* was a good Foundation for a Declaration in *Assumpsit*, which was hard to maintain, yet it doth not appear that that Writ was ever returned, or of Record in Court, or any Appearance thereto, or any Continuances thereof, which ought to be alledged.

Gargrave *versus* Every.

Hill. 5, 6 W. & M. Rot. 1815. C. B.

THE Plaintiff declares in Case on several Promises. The Defendant pleads non assumpsit infra sex annos. To which the Plaintiff replies, that an Original was brought by the Testator for the same Cause, and return'd of Record, and that the Testator died pendente brevi, and avers that he Defendant had promised within six Years of the said Original. Demurrer and Joinder in Demurrer.

fo. 261.

Assumpsit by an Executor.

fo. 264.
The Death
of the Plain-
tiff before
Judgment, is
not within
the Proviso of
21 *Ja. c. 16.*

Salk. 293, 424,
425.

For the Plaintiff it was insisted, that this Case was within the Equity of the Statute of 21 *Ja. cap. 16. par. 4.* whereby it is provided, that if in any of the said Suits a Judgment given for the Plaintiff be reversed, or Judgment be arrested after Verdict, or if the Action be by Original, and that the Defendant be outlawed, and after shall reverse the Outlawry; that in all such Cases the Party Plaintiff, his Heirs, Executors, &c. may commence a new Action, within a Year after, &c. But *per Cur'* tho' this is a hard Case, yet the Statute hath not provided for it, and the Defendant had Judgment. *Lutwyche* of Council for the Plaintiff.

Trippet versus Naylor.

Hill. 13 W. 3. Rot. 1106. C. B.

fo. 265.

IN Assumpsit for Goods sold 1 May, 13 W. 3. the Defendant pleads, that the Plaintiff 29 January, 1699, together with his other Creditors, gave him a Letter of Licence for 2 Years, and thereby covenanted, that if he should be arrested, &c. then the said Deed should be a Release, &c. That the said 29 January he was indebted to the Plaintiff who within the said 2 Years sued out a Capias against him, on which he was arrested, and on his Appearance, the Plaintiff declared ut supra. That the said Arrest was for the said Debt due 29 Jan. Et hoc &c. Unde pet' judic' si actio &c. Upon this the Plaintiff prays Oyer of the Deed, and then demurs.

These

These Exceptions were taken to the Plea.

fo. 271.

1. That the Deed of Composition bearing Date before the Promises in the Declaration, a Traverse ought to have been taken, &c.

2. That the Plea was not well concluded, for the Deed operated as a Release, and ought to have been pleaded accordingly. (As to that *vid.* 21 H. 7. 30 Br. *Defeasance* 16. and also *Bustly* and *Walsh's Case*, Hill. 5 W. & M. Rot. 1839. C. B. a Case in Point.) But these Points were not resolved by reason of the Plaintiff's Death; but *Powell* Justice, did afterwards say publicly in Court, that *Gould* Justice had informed him, 'twas the Fault for which Judgment was given against the Defendant in the said Case of *Bustly*. *Lutwyche* of Council with the Plaintiff.

Yeoman versus Barstow.

Trin. 13 W. 3. C. B.

IN an Action on the Case on a Special Promise, the Plaintiff declares, that being possessed of several Pieces of old Money, amounting in Number and Tale to 300 l. the Defendant in consideration she would pay him the said old Money, promised to pay her 300 l. new Money, with 4 l. 10 s. per Cent. Interest at such a Day.

fo. 271.

Assumpsit on a Special Promise.

On Non *assumpsit*, and Issue taken thereon, Verdict was given for the Plaintiff; and after several Debates by Council of both sides, and great Consideration taken by the Court for the space of two Terms, after the Arguments of the Council, Judgment by the Opinion of the whole Court was given for the Plaintiff, in *Trin. Term. 1 Annæ R. 1702.* And

fo. 273.

If it appears that the Contract is usurious, and can't be otherwise, Judgment shall be against the Plaintiff.

Where there is no Loan, there can be no Usury.

fo. 274.

it was agreed, that if it appeared by the Plaintiff's shewing in the Declaration, that the Contract was usurious, and could not be otherwise, that Judgment ought to be given against him. But they were of Opinion, that it did not appear here that of Necessity the Contract is usurious; and the Jury having found the *Assumpsit*, they would not intend it, but the contrary. And *Powel* Justice said, that the Consideration of the Promise here is, *Quod præd' Quær' solveret præd' Def' præd' 300 l.* So that there is no Loan here, and without it there can't be any Usury; and they would not intend a Loan, unless the Jury had found it; but they have found that the Defendant *Assumpsit*. And by him (*& ut puto*) by *Blen-cow* Justice also, if a Man hath great Occasion for Guineas, and can make great Advantage thereby, and to that purpose gives another Money beyond the Value of them, that is not Usury. And by *Powell* Justice there is great Difference between *Interesse Lucri* and *Interesse Damni*; and for that he cited *Grotius de jure Belli & Pacis, lib. 2. c. 12. par. 20 & 21.* and by him Debt lieth not for Interest. 2 *Rolls Abr.* 82. 1 *Ventr.* 198. *Pratt* and *Hooke* for the Defendant, *Cartber* and *Lutwyche* for the Plaintiff. Note, The Judgment was affirmed in *B. R.*

Lawson versus Lamb.

Hill. 12 W. 3. Rot. 1560. in C. B.

fo. 274.
Assumpsit by
an Assignee of
the Commis-
sioners of
Bankrupt.

IN *Assumpsit* brought by the Plaintiff as Assignee of the Commissioners of Bankrupt on a Bill drawn by the Defendant, whereby he promised to pay the Bankrupt 80 l. and on several other Promises, the

the Defendant pleaded, That such a Day he accounted with the Plaintiff, and was found indebted in 60 l. 10 s. 5 d. and that he paid it, &c. Replication that he did not account, and Issue thereupon.

The Objection to the Declaration was, that all the Proceedings of the Commissioners of Bankrupt ought to be alledged at large; but by reason of divers Precedents according to the Declaration here, Judgment *per totum Cur'* was given for the Plaintiff.

fo. 277.
The Proceedings of the Commissioners need not be alledged at large.

Manne versus Carey.

Hill. 8 W. 3. Rot. 396. C. B.

THE Plaintiff sets forth the Custom, &c. and declares, that one J. P. 29 May, 8 W. 3. drew a Bill of Exchange on the Defendant, &c. which was presented to him, who accepted it on condition to pay it by a Bank Bill, which the Plaintiff agreed to, and delivered him the said Bill of Exchange. Præd' tamen Cary delivered him a Bank Bill in which he had no Property, and avers, that he (the Plaintiff) could not receive the Money in it, &c. The Defendant pleaded non assumpsit.

fo. 277.
Assumpsit on a Bill of Exchange.

Verdict for the Plaintiff; and after several Motions in Arrest of Judgment, the Plaintiff had Judgment. Lutwyche for the Plaintiff, and Wright the King's Serjeant for the Defendant.

fo. 279.

The chief Exception was, that the Plaintiff ought to alledge the Breach of Promise directly, as the Promise is alledged, and for that the Case of *Wright and Johnson*, 1 Ventr. 64. was cited; where an *Assumpsit* was to deliver a Horse in as good plight as it was at the time of the Delivery thereof to the Defendant.

fendant; and the Plaintiff averr'd, that the Defendant had not deliver'd the Horse without more; and after Verdict, Judgment was given for the Defendant, which as *Powel* Justice said was a strange Case.

Another Exception was, that the Plaintiff had not averr'd that the Bill drawn by *Perry*, &c. was drawn according to the Custom of Merchants, according to the Custom alledg'd in the Declaration to that purpose; *sed non allocatur*, for it shall be so intended.

Brereton & Ux' versus Moyse.

Hill. 9 W. 3. Rot. 317.

fo. 279.
Assumpsit by
Baron and
Feme.

IN an Action on the Case on several Promises made to the Wife *dum sola*, the Defendant pleads *Non assumpsit infra sex annos*: And the Plaintiffs reply, that such a Day an Original Writ was by them sued out against the Defendant in *Trespass*, directed, &c. which Writ was prosecuted with Intent to declare against the Defendant on his Appearance in *Trespass* on the Case; that the *Capias* on the said Original was continued till the Defendant such a Term appeared: And thereupon they declar'd against him *ut supra*. Demurrer and Joinder in Demurrer.

fo. 280.

Judgment was given for the Plaintiff; but it was reversed for the Causes in the Case of *Kinsey and Hayward*, *ante* 256.

Russell versus Williams.

Pasch. 3 W. & M. Rot. 441. C. B.

THE Plaintiff declares on several Promises, in Bar whereof the Defendant pleads a Sub-
mission to two Arbitrators, who awarded, that the Defendant should pay the Plaintiff 7 l. 15 s. and that the Parties should equally expend at the Payment or Delivery of the Defendant's Note under his Hand pro valore, and then says quod semper parat' &c. to which Plea the Plaintiff demurs.

fo. 281.
Assumpsit an Admin'.

Against this Plea it was objected, that the Arbitrament was void; for that it was only of one part, because the Money to be paid by the Defendant is not awarded to be in Satisfaction or Discharge of any thing, nor is any thing awarded to be done to the Defendant, or for his Benefit.

fo. 283.

2. Because if the Award had been good, yet the Award it self without Execution thereof, viz. the Payment of the Money, or Tender and Refusal thereof, which in Law amounts to Payment, or other Fault of the Plaintiff, is not any Bar. *Keilway* 121. a. 17 E. 4. 3. *Cro. El.* 66. *Hare and Gorge's Case*, and *Lynch and Darcey's Case*, 1 *Keb.* 484.

Also the pleading that he was *touts temps prist* to pay, without Tender in Court, is to no purpose, 7 *H.* 4. 30. b. 8 *H.* 6. 25. b. and is not like to the Case where the Money is actually tender'd to the Plaintiff; for then there is no need of any Tender, as 16 *H.* 7. 7. and 19 *H.* 8. 12. are. Judgment for the Plaintiff *per tot' Cur'* See before *Dighton & al. versus Whiting*, fol. 51.

C O V E-

COVENANT.

Gifford *versus* Young, Son and Heir of
Tho. Young.

Hill. 35 & 36 C. 2. Rot. 455. C. B.

fo. 287.
Action of
Covenant on
Covenants,
made be-
tween the
Defendant's
Father and
the Plaintiff,
and one M. Y.
deceas'd.

THE Plaintiff declares quod per quandam Indenturam factam &c. testat' est, that Tho. Young in consideration of a Marriage, &c. did covenant that he, &c. would stand seised of the Mannor of C. &c. to the Use of himself and his Heirs till the said Marriage, and then to the Use of himself for Life, the Remainder to Margaret his intended Wife for her Life for her Jointure, with other Remainders over, and did thereby also covenant that the Premises were of the yearly Value of 400 l. ultra reprizas &c. that the Marriage did take Effect, and the said Tho. Young such a day died, and the said Margaret him survived; that the Premises were not of the yearly Value of 400 l. but of the yearly Value of 165 l. and no more, ad damnum 2000 l. The Defendant pleads riens per discent; and the Plaintiff replies, that he and the said M. Y. after the Death of the said Tho. Young, viz. 12 July, 29 C. 2. sued out an Original against the Defendant, ret' tres Mich' at which Day the then Plaintiffs appeared, and the Sheriff return'd a Nichil; whereupon a Capias issued retornable Octab. Hill. which was continued per Vic' non misit breve till Octab. Hill. 31 C. 2. at which Day the Parties appear'd, and the then Plaintiffs declar'd ut supra mutat' mutand' ad dam' 1000 l. that the Defendant tunc nil dixit in bar-
ram;

ram; whereupon a Writ of Inquiry of Damages was awarded, retournable quin. Pasch. which Writ was continued by Vic' non misit breve till octab. Hill. that the said M. Y. after the last Continuance, &c. seipsum elongavit, and died 7 March, 33 C. 2. that the Plaintiff had not notice thereof till the 30th of June, 33 C. 2. and thereupon he purchased this Writ 14 July, 33 C. 2. on which the Sheriff return'd Nichil; whereupon a Capias was awarded, at the Return whereof the Parties appear'd, and the Plaintiff declar'd ut supra, and says, that at the Day of the Purchase of the first Original the Defendant had Assets by Discent, and so concludes with an Averment, that the Cause of Action is the same. To this the Defendant rejoins that the first Writ was discontinued: To which Rejoinder the Plaintiff demurs.

In the Argument of this Case the Defendant's Council insisted on these Points:

fo. 296.

1. That there was a material Variance between the first and the second Declaration; for in the first the Plaintiffs declared but to the Damage of 1000*l.* and in the second the Declaration is to the Damage of 2000*l.* which ought not to be; for the second Writ ought to be in Continuance of the first Writ, as *Spencer's Case* is.

2. That the first Writ abated by Default of the Plaintiffs; for *M. Y.* died the 7th of March, 33 C. 2. and the last Continuance which was on the first Original, was to Octab. Hill. 31 C. 2. and the Death of *M. Y.* was the 7th of March, 33 C. 2. as is alledged by the Plaintiff himself; so that the first Original was discontinued for a long time in the Life of *M. Y.* and then no Writ of *Fourney Account* lieth. And altho' the Plaintiff hath alledged, that *M. Y.* died after the last
Conti-

Continuance, that will not avail, for a precise Time ought to be alledged, so that it may appear to the Court that his Death was between the Day *from* which, and the Day to which the Action was continued: And so are all the Precedents.

3. That the second Writ was not brought within due Time, for there were four Months and more, after the Death of *M. T.* before the Purchase of the second Original; for *Matthew* died the 7th of *March*, 33 C. 2. and the second Writ was purchased the 14th of *July*, 33 Car. 2. and that the Plaintiff had not Notice of his Eloignement and Death till the last Day of *June*, 33 C. 2. was not material in the Case; for no Body was obliged to give him Notice, and therefore he ought to take Notice of it himself; and then it appears on the Record, that the Plaintiff had not freshly pursued this second Original, as all the Pleadings are in Case of a Writ purchased by Journey's Account. *Lutwyche* for the Defendant.

fo. 297.

No Judgment was in the Case, nor any further Proceedings, as I was informed by the Plaintiff himself, who was Mr. Gifford of *Gray's Inn*; the Reason whereof (as he told me) was, because there was a Difference of Opinion between the Judges, whether the Second Action was brought within due time or not.

Whether a Note, As to the first Point, the Case of Sir Writbrought *Tho. Finch*, Cro. Car. 294. where in *Assumpsit* by Journey's the first Action was brought in *Kent*, and the Account may second in *Suffolk*; and the Damages in the vary from the first Action were 500 *l.* and in the second Damages alledged in the 600 *l.* And yet in a Writ of Error in *B. R.* on former. Judgment given in the *Common Pleas*, the Judge

Judgment was affirmed. And as to the Damages, the Case of *Boile and Scarborough, Stiles* 440. is according.

And as to the third Point of this Case of *Gifford and Young*, it is said in the said Case of Sir *Tho. Finch*, where a new Original was purchased after the Reversal of an Outlawry, that the new Original was brought within a Year after the Reversal of the Outlawry, and yet adjudged good. But in *Winch* 82. it is said by the Court, in the same Case, in Effect, that it ought to be brought immediately after the Reversal of the Outlawry.

What shall be intended a recent Prosecution.
Salk. 393.

Knight versus Green & Ux' Administr' of J. Webb.

Hill. 1 & 2 *Jac.* 2. *Rot.* 1385. C. B.

THE Plaintiff declares, that 12 June, 30 C. 2. he did by Indenture, &c. demise a Messuage, &c. to J. W. habend' for 99 Years, if the Lessee, *Priscilla his Wife, and John their Son*, should so long live, at the yearly Rent of 22 s. &c. and yielding a Herriot on the Death of each of them who should die possessed: By which Indenture the Lessee inter alia covenanted not to assign without License, and on this Covenant the Breach was assigned. To which Declaration the Defendants demurred.

fo. 297.
Covenant on an Indenture of Demise made by the Plaintiff to J. W. the Intestate.

The Exception taken to the Declaration was, that it was not shewn by whom the Letters of Administration were granted to the Defendant *Priscilla*, and what Authority she had. *Sed non allocatur*; for the Plaintiff who is a Stranger, need not shew it, tho' an Administrator who is Plaintiff ought to shew it,

fo. 301.
In a Narr' against an Administrator it need not be shewn by whom Administration was granted, &c.

Aliter if an
Administra-
tor is Plain-
tiff.

it, 1 Sid. 228. *Peyto and Ruddock's Case*, Stiles
463. *Ingram and Fawcet's Case*, Stiles 106
Clementson and Mountford's Case.

Lucke versus Lucke & al'

Trin. 1 Ja. 2. Rot. 1709. C. B.

fo. 302.
Action of
Covenant on
a Deed Poll.

THE Plaintiff declares, that the Defendants by their Deed reciting that F. L. died intestate, having an Estate to the Value of 775 l. 7s. 6 d. one Moiety whereof belonged to M. L. the Relict of F. L. and the other Moiety, as was supposed to the Defendants, notum fecer' oninibus, that they had received of the Plaintiff 385 l. 13 s. 9 d. in full Payment of their Shares, and covenanted to indemnifie the Plaintiff from all Persons claiming Interest in the said Moiety. And then assigns for Breach that E. C. the Intestate's Sister ex patre latere, sued the Plaintiff in the Prerogative-Court for her Share of the said half; and thereupon taliter process' fuit, that in the same Court a Decree was made against the Plaintiff for 43 l. 1 s. 6 d. of which he gave the Defendant Notice. Prædictamen Def' &c. Judgment for the Plaintiff Nichil dicit.

fo. 305.

These Exceptions were taken in arrest of Judgment :

1. That the Plaintiff is no Party to the Deed of Covenant, neither is the Covenant made with him.

2. That there is no Place alledg'd in the Declaration where the Spiritual Court was held when the Decree was made, which ought to be, because that it is movable, and therein the Damnification of the Plaintiff consists, and is issuable.

Covenant.

III

As to the first Exception it was answer'd and resolv'd by the Court, that the Declaration was good enough, and for that the Case of *Cooker and Child* was cited by *Levinz* Justice, which Case is now reported by him in his 2 Rep. 74.

Resp. 1.

But as to the second Exception it was said by the Court, That it was an incurable Fault, for altho' it was insisted by the Plaintiff's Council that it was alledged in the Declaration, that the Plaintiff was sued in the Spiritual Court held at *W.* before Sir *Leoline Jenkins* the Judge of the same Court, and that *taliter Process' fuit* in the same Court, that Sentence was there given by the same Judge, and therefore it might well be intended, that all was at the same Place; yet it was resolved by the whole Court, that altho' they might intend it to be the same Court for Jurisdiction and Authority, yet they would not intend it to be the same Court as to local Residence; as if one wou'd plead that such a thing was done *B. R.* and that after there were other Proceedings thereupon, he ought to shew in what Place the Court was held, as well when the last Proceedings were, as in what Place the Court was held when the first Proceedings were. And on this Exception Judgment was arrested.

Resp. 2.

How Proceedings in a Court which is movable ought to be pleaded.

It was said by the Judges in this Case, that *St. Paul's Church-Yard* was a sufficient *Venue*, as *White Hall*, *King-Street*, *St. Margaret's Westminster*.

Lambert

Lambert *versus* Lane.Trin. 3 *Ja.* 2 Rot. 1991.

fo. 306.
Debt for
200 l.

THE Plaintiff declares on a Deed whereby the Defendant covenanted with him that in case the Defendant shou'd by the Plaintiff's Means or Procurement obtain any Estate, &c. in a Messuage, &c. in Com' Midd' that then he wou'd on Request make unto the Plaintiff a Lease for 50 Years of some Rooms in the House particularly mention'd. Et ad performat' inde obligasset seipsum, &c. in 200 l. Avers that the Defendant by his means had obtained a Term of 60 Years in a Messuage, &c. and that he had not made him a Lease. &c. but pull'd down one part thereof. Demurrer and Joinder in Demurrer.

fo. 308.

Judgment was given in this Case without Argument by the Course of the Court, because the Defendant did not appear to argue his Demurrer; but the point intended (as it seems) was, that the Plaintiff ought to have alledged that he had requested the Defendant to make him a Lease; but it seems that was unnecessary, the Defendant having disabled himself to do it by pulling down the Buildings. See these Cases Co. 5. 20. Fitzb. Covenant 2 & 29. Co. 1. 25. b. 2 Cro. 375. 21 E. 4. 55. b.

In what
Case a Re-
quest is not
necessary.

Brailsford *versus* Parsons.Mich. 3 *Ja.* 2. Rot. 350. C. B.

fo. 308.
Covenant
on a Demise
made by the
Plaintiff to
the Defen-
dant.

THE Plaintiff declares that such a Day &c. he by Indenture, &c. demised to the Defendant

fo. 316.

By the Opinion of the whole Court, the Plaintiff had Judgment, because the Defendant had not sufficiently answered the Breaches assigned by the Plaintiff; for he assigned Defaults of Reparations of Things which were ruinous and in Decay, not for want of principal Timber; and also it is apparent, that for the Reparation of some of the things in decay and out of repair principal Timber was not necessary: and also if principal Timber had been requisite for the Repairs no Default is alledged by the Defendant in his Bar in the Plaintiff that such Timber was not had, for thereby he alleges that he had given notice that such Timber was requisite, &c. and that the Plaintiff had not deliver'd it to the Defendant; whereas it appears by the Covenants that the Plaintiff was only to provide it ready for Carriage, and it is also to no purpose, for it is admitted by implication, that the Plaintiff had not provided principal Timber, because it ap-
I
pears

pears by the Breach assign'd by him, such Timber was not requisite; and also the Plaintiff could not have replied, that he had provided, or that he had deliver'd such Timber, for that had been a Departure from his Declaration.

Reeves *versus* Sheppard.

Hill. 3 & 4 Ja. 2. Rot. 1769. C. B.

fo. 323.
Debt by the
Plaintiff as
Admin' of
Will. Waite.

DE B T on Bond, the Defendant craved Oyer of the Condition, which was to perform Articles between the Defendant and the Intestate, which Articles the Defendant did set forth, whereby (after a Recital that the Intestate in the Right of his Wife was entitul'd to a third Part of the Profits, &c.) 'twas agreed that the Intestate should take yearly, during the Life of his Wife, 10 l. in Satisfaction of her third Part, &c. which 10 l. the Defendant covenanted to pay the Intestate by equal half yearly Payments, &c. and the Intestate covenanted to accept it in Satisfaction of his Wife's Dower, &c. and then pleaded Performance generally. To which the Plaintiff replied, and assigned for Breach, that the Intestate's Wife was alive after the 25th of March, 1 Ja. 2. and that 5 l. due to him at that Day is yet unpaid. Demurrer and Joinder in Demurrer.

fo. 326.

And by the Opinion of the whole Court, the Payment of the 10 l. by the Intent of the Articles, was to continue but during the joint Lives of Waite and his Wife, and therefore Judgment was given for the Defendant.

Lee *versus* Johnson.

Hill. 3 & 4 Jac. 2. C. B.

THE Plaintiff declares that by Indenture, &c. fo. 326.
 he did demise to the Defendant a Messuage Action of
 in Yorkshire, habend' for nine Years, at the year- Covenant on
 ly Rent of 35 l. That the Defendant covenanted to an Indenture
 repair the same, ac omnia ripas aquaductas fos- of Demise.
 sas pontes & fensas eidem pertin' On which
 Covenant the Plaintiff assigns the Breach as follow-
 eth, viz. Quod præd' Messuag' præd' ripæ
 viz. 20 perticat' riparum quodlibet perticat'
 inde pretii decem libr' 10 pontes quilibet
 pons &c. 40 perticat' fensur' quodlibet &c.
 100 perticat' fossar' quodlibet &c. de præmiss'
 præd' fuer' fract' dirupt' prostrat' spoliat' & in
 magno decasu pro defectu reparationis &
 mundationis &c. To which declaration the De-
 fendant demurr'd, and the Plaintiff joined in the
 Demurrer.

The Exception to the Declaration was, fo. 329.
 that the Breach so generally assigned, was
 not well assigned. But it was adjudged the
 Declaration was good, the Breach being as-
 signed according to the Words of the Cove-
 nant.

Kath. Aldworth *versus* Hutchinson.

Pasch. 4 Jac. 2. Rot. 322.

THE Plaintiff declares that one Joseph fo. 330.
 Aldworth was outlawed at the Suit of Action of
 J. Stonehouse. That 23 June a special Cap' Covenant on
 Utlagat' issued against J. Aldworth, and was de- a Covenant to
indemnifie
the Plaintiff
by reason of
his paying the
Defendant a
Debt due
from a Person
outlaw'd,
 livered

livered to the Sheriff. That the Plaintiff at the time of the issuing of the Writ, had in her Hands 100 l. of J.'s Money. That the Sheriff returned the Writ, whereby it was found accordingly. That after the Inquisition, and before the Return of the Writ, the Plaintiff paid to the Defendant 64 l. part of the 100 l. in her Hands, in consideration whereof, the Defendant covenanted by Deed dated 23 Aug. 2 Ja. to indemnifie the Plaintiff from all Actions, &c. which should be commenced, &c. so far as the said 64 l. amounted to, so that such Suit was commenced by, or before the end of Michaelmas Term then next; and avers that the Defendant hath not paid the said 64 l. to the King or Plaintiff. That the Transcript of Outlawry, &c. was delivered into the Exchequer, and a Scire facias issued out of the Exchequer against the Plaintiff. Judgment was thereupon given against her. To this the Defendant protesting that the Plaintiff was not dampnified before the end of Michaelmas Term, says, that the Scire facias out of the Exchequer, rei veritate, first issued after the end of the said Term, viz. such a Day. The Plaintiff replies that the Writ bore Date 29 Novemb' 2 Ja. being the last Day of Michaelmas Term, and Demands Judgment, if the Defendant shall be admitted to say, &c.

fo. 333. These Exceptions were taken to the Declaration in this Case.

Judicial
Process shall
be intended
to issue in
Term-time.

1. That it is not said that the Cap' Utlagat' issued in Term-time. *Sed non allocatur*; for *per Cur'* it being a judicial Writ, it shall be intended when there is no Reason to the contrary; for by the Course of the Court it ought to be so, *Latch* 11. *vid.* 2 *Jones* 150. 1 *Ventr.* 362.

2. That it was not said that the Writing containing the Covenant, *Sigillo suo fuit sigillat'*. *Sed non allocatur*; for *per Cur'* it is said, that

that the Defendant thereby covenanted, which could not be if it was not a Deed,

4 Leon. 175.

3. That it is said *prout patet per Recordum*. *Parat' est verificare*; but (*per Record' ill'*) is *verificare*, with-
omitted. *Sed non allocatur*; for *per Cur'* it is *out saying per*
well enough without those Words. 1 Sid. *Record' yet*
good.

429.

4. But the Question which was worthy of Consideration was, whether, as this Case is, If one shall
the Defendant shall be admitted to say, that *be estopp'd, to*
the *Scire facias* was prosecuted out of the *say a Writ if*
Court at any other time than at that which *sued at ano-*
it bears Date; and *Bailie and Bunning's Case*, *ther Day than*
1 Sid. 271. and 1 *Rolls Abr.* 893. *F. N. B.* 78. *b.* *it bears date.*
were cited. The Matter was adjourned to
be argued the next Term; but it doth not
appear by the Court-Book, that it was ever
after argued by the Council of both sides.
But it appears by the same Book, that in *Salk. 457.*
Trin. 2 W. & M. Serjeant *Trinder* appeared for *Pl. 1.*
the Plaintiff, and that Judgment was given
for the Plaintiff, *Nisi &c.* And it doth not
appear by the said Book, that any Cause was
shewn to the contrary; but no Judgment is
entred on the Roll, *ex relatione Magistri Mills,*
Cler. Thesaurar. C. B.

And so by this Judgment it appears (if it *fo. 334.*
was given by reason of an *Estoppel* in the
Case) that in Judgment of Law a Covenant
may be broke, where *revera & in facto* it was
not broke. *Quod nota.* But for this Matter
vid. Raymond, 161. 2 Jones 149, 150. 2 Keb.
198. Britton and Long's Case. 838 and 844.
Green and Jones's Case. 1 Sid. 432. Man and
Adams's Case. 1 Rolls Abr. 552. Let. F. Nu.
4 and 5. And note.

Tuckerman *versus* Tuckerman.

Pasch. 4 Ja. 2. Rot. 590. C. B.

fo. 334.
Debt against
an Admin' on
a Bond for
Performance
of Covenants.

DEBT on Bond, on Oyer it appeared to be for Performance of Covenants between the Plaintiff and the Defendant's intestate; upon this the Defendant sets forth the Deed, which reciting that the Plaintiff and the Intestate were Coexecutors, witnessed that the Plaintiff had made over all the Goods, &c. to the Intestate, and had demised to him, &c. In which Deed inter alia was this Clause, viz. *Ac etiam ulterius except' quod præd' Susanna habeat &c. necnon habeat 200 fasces jampnor' vel fasces ligni quolibet anno &c. and then pleads Performance. To this the Plaintiff replies, that she had not of the Intestate, or of the Defendant after his Decease, 200 Furze Faggots, or 200 Wood Faggots yearly, secundum &c. but 800 Furze Faggots, or 800 Wood Faggots, were due to her from the Intestate, and the Defendant post ejus mortem for four Years ending at, &c. Upon this the Defendant demurs.*

fo. 338.

Judgment in this Case was given for the Defendant, because it was held that the Deed, as to the Faggots, did not amount to a Covenant that the Intestate should provide the Faggots at his proper Costs and Charges, and deliver them to the Plaintiff; but that it was only a Liberty reserved to the Plaintiff, to take yearly on the Lands so many Faggots; and also because it was not shewn by the Plaintiff what Quantity of Faggots she had not received in the Life of the Intestate, and what after his Death. For perhaps the Defendant had several Matters to plead, viz. a distinct Matter, as to those which the Defendant

pendant had not received in the Life of the Intestate, and another Matter as to those which were not received by the Plaintiff after the Intestate's Death.

Thomas Major, *Administrator of John Wood, not administred by Deborah Wood Plaintiff, versus Daniel Peck and Ursula his Wife, Executrix of Richard Wood.*

Intrat. Mich. 3 W. & M. Rot. 395. C. B.

THE Plaintiff declares, quod cum per quandam Indenturam fact' 21 Decembris 34 C. 2. &c. testat' exist' that John Wood demised to Richard Wood & al' a Messuage called the Hare in Pater-noster-Row, except the Use of the said Messuage, &c. for the first two Years of the Term, habend' for 21 Years from the Feast of Christmas then next, at the yearly Rent of 70 l. payable quarterly. By which Indenture the Lessees covenanted jointly and severally, that they, or one of them, would pay the Rent. That John Wood the Lessor, 20 Decemb' 35 C. 2. made his Will, and the said Deborah his Executrix, and afterwards, scil' 10 March 1684. died possessed of the Reversion, &c. post cujus mortem scil' 21 Martii 1684. Deborah proved the Will. That the Lessee Richard Wood, 15 Januarii 1685. made his Will, and the Defendant Ursula his Executrix, and died, who proved the Will. That Deborah afterwards, scil' 31 May 1688. died intestate, whereupon Admin' de bonis non &c. was granted to the Plaintiff durante minori ætate R. Wood. That Ursula afterwards, scil' 10 June 1689. married the Defendant. That 87 l. 10 s. for a

fo. 339.
Covenant
on an Indenture of Demise.

Year and a Quarter ending at Midsummer, anno Regis & Regin' nunc tertio post mortem præd' Johannis Wood & Deboræ & post desponsalia inter præd' Daniel & Ursulam celebrat' were in Arrear, and are yet unpaid. Et sic &c. ad dampn' &c. Et profert &c. cum hoc quod verificare vult, that R. Wood is under the Age of 21 Years, &c. The Defendant imparles, and then pleads that R. Wood, since the last Continuance, hath attained the Age of 21 Years; to which Plea the Plaintiff demurs.

fo. 342:
A. Administrator till B attains the Age of 21, brings an Action, pending which B. attains 21, A. can't proceed.
 I was retained with the Defendants to argue this Case; but the Plaintiff never entered it for Argument. But I did intend to insist, 1. That the Plea was good. 2. That the Declaration was ill. And as to the first, altho' the Action was well commenced, yet when Rebecca attained the Age of 21 Years, the Authority of the Plaintiff was entirely determined, and by Consequence the Action also. And for that in Debt by *Ford v. Glanville & Ux' Admin'* during the Minority of J. S. the Defendants pleaded, that J. S. attained his Age pending the Action; and it was adjudged a good Plea, *Goldsb. 136*. In a *Scire facias* brought by an Administrator *durante absentia* of another, on Oyer of the *Scire facias* the Defendant demurred, and an Exception was taken, that such Administration was void, and not allowable by Law. But the Exception was over-rul'd, for it was held clearly by the Court, that such Administration was well grantable by the Law, and there might be great Conveniency thereby; for if the next of Blood be beyond the Seas, if such Administration could not be granted, the Intestate's Debts could not be collected or recovered. And it was also held by the Court,

Administration may be granted durante absentia. Salk. 42.

Court, that after the Return of the next of Blood, Payment of a Debt to such Administrator before Notice is good. And it was also held by the Court, that altho' an Action brought by such Administrator, might abate by the Return, &c. yet Actions against him are not abated, but shall continue against the rightful Administrator. *Clare and Hedge's Case* adjudg'd *Pasch. 3 W. & M. B. R.* If an Administrator *durante minori ætate* of an Infant Executor hath Judgment, and then the Executor comes of Age, he shall have a *Scire facias* to execute the Judgment. *Rolls, Tit. Executor. 888. Litt. p. Pl. 1, 2. Brownl. 83.* So if an Administrator hath Judgment, and before Execution the Letters of Administration are revoked, the Defendant shall have an *Audita Querela* to prevent Execution against him. *2 Saund. 48. b. Mod. Rep. 62.* So if the Defendant be actually in Execution. *Relv. 125.* *Kett's Case.* By which Cases it is proved, that an Administrator can't proceed in an Action after his Authority is determined.

Payment to such an Administrator after Return and before Notice, good.

fo. 443.
If an Administrator hath Judgment, and then the Administration is revoked, the Defendant shall have an *Audita Querela*, to prevent, &c.

As to the Declaration, there is a material Variance between it and the Writ; for the Writ is brought by the Plaintiff as an absolute and compleat Administrator, and by the Declaration it appears that he is but a qualified and limited Administrator, and therefore he ought to be so named in the Writ. *Browne's Entr. 1. par. 18. Ashton's Entr. 218.* So in an Action against such Administrator, *Herne 301.* So if one brings an Action as Administrator *cum Testamento annexo. Vid. 75.*

If an Administrator *durante, &c.* brings an Action as Administrator generally, 'tis a Variance.

R. Pike *versus* Pulleyn.

Trin. 5 W. & M. Rot. 660. C. B.

fo. 343.
Writ of Privilege by an Attorney in Covenant between the Plaintiff and Defendant.

THE Plaintiff declares, quod cum per quosdam Articulos fact' apud London &c. agreed' fuit, that Tho. Pike, Vicar of Southo, should permit the Defendant to receive to his own Use all Duties arising to him as Vicar of Southo for a Year, due at Mich' then next; and on Request should make a Grant thereof to the Defendant for Life, and should surrender the Vicaridge, so that the Defendant might present de novo: And the Def. did thereby covenant to pay the Plaintiff 150 l. in lieu of Tithes, &c. then avers that T. P. had perform'd all, &c. and assigns for Breach that the Defendant had not paid the said 150 l. The Defendant pleads that T. P. died at Southo before Michaelmas, per quod he could not receive the Tithes. Demurrer and Joinder in Demurrer.

fo. 345.
If an Action is brought in A. and the Defendant pleads a transitory Matter in B. 'tis ill.

An Exception was taken to the Bar, viz. that the Defendant had pleaded a transitory thing, viz. the Death of Tho. Pike at Southo, and the Action is brought in London; and that it was a good Exception, the Case of *Collins and Sutton*, 1 Sid. 234. 1 Saund. 84. *Wright and Ramsden's Case*, and 3 Cro. 184. *Cowley and Edwards's Case* were cited.

Whether a Contract to resign a Benefice, so that the Patron may present de novo, shall be Simoniacal.

But then an Exception was taken, that the Contract in this Case was Simoniacal, by Reason of the Covenant to resign, and by Consequence void. But as to that it was said by the Plaintiff's Council, that the Covenant is, that the said Tho. Pike by all lawful Means should resign on the Request of the Defendant; which is all one in Effect as if it had been said, that Tho. Pike should resign

if it might be done by lawful Means: So that it was the Intent of the Parties, that the Resignation should not be made, if it might not be made lawfully. But admitting that those Words (by lawful Means) had been omitted, the Contract had not been Simoniacal; for the Covenant for Payment of the said 150 *l.* is a distinct and independent Covenant. And for that the Case of *Byrt* and *Manning*, *Cro. Car.* 425. was cited, which was such. The Plaintiff brought an Action of Debt on a Bond for Performance of Covenants; which were, that *Tho. Byrt*, the Plaintiff's Son, should marry *Ann*, the Defendant's Daughter, and that in consideration of the said Marriage the Defendant covenanted to pay 300 *l.* And the Plaintiff covenanted to assure such Land to *Thomas* and *Ann* for her Jointure. And there were other Covenants for the Value of the Land and quiet Enjoyment; and among the rest, a Covenant of *Manning* that he would procure the said *Thomas* to be presented, &c. to such a Benefice on the next Avoidance thereof; and on that the Breach was assigned, and on Demurrer it was adjudg'd for the Plaintiff. And it was said by the Court, that if the said Covenant had been that in Consideration of the said Marriage, the Defendant had covenanted to procure the said *Tho. Byrt* to be presented, that had been a Simoniacal Contract, and had made the Obligation void. But the Covenant was not in Consideration of the former Covenants, but a meer distinct Covenant and independent of the former Covenants. And without special Averment that it was a Simoniacal Contract, it should not be intended to be so; for
it

it might be a Covenant on good Consideration. Which Case was directly with the Case in question. And the Plaintiff had Judgment by the Opinion of the whole Court. For the Simony *vid. Litt. Rep. 117. Mo. 564. Oldbury's Case, and Mackabar and Siderick's Case, Cro. Car. 337. and 61. Lutwyche for the Plaintiff.*

Lamplugh *versus* Shiers.

Mich. 10 W. 3.

fo. 351.
Covenant by
the Assignee
of the Rever-
sion on a
Lease for
Years against
the Assignee
of the Lessee.

THE Plaintiff declares, that one T. Ashby, 11 May, 3 W. & M. was seized in Fee of a Piece of Land, and did then by Indenture reciting that one Griffin had built and agreed to build on the said Piece, &c. 15 Houses, demise the same to Griffin, habend' for 61 Years, at 100 l. per Ann' the first Payment to be made 25 March 1690; that Griffin covenanted to build the Houses on or before 25 March then next, to pay the Rent, and to repair; that he built the 15 Houses 12 May; that Ashby granted the Reversion to Sir Philip Meadows and others by Lease and Release; that they by Lease and Release granted the Reversion to the Plaintiff; that 21 May, 4 W. & M. the Term for Years made to Griffin was assign'd to the Defendant, and then assigns for Breach, 1. That 550 l. was in Arrear for five Years and a half. 2. That 5 March, 5 W. & M. one of the Houses was burnt down and so continues, &c. Demurrer and Joinder in Demurrer.

fo. 356.
If one pleads
that another
remiser relaxa-
vit & confir-
mavit to him,
and relies on-
ly on the Re-
lease, it is not
double.

These Exceptions were taken to the Declaration in this Case:

1. That the pleading that Sir Philip Meadows, and the others, remiser' relaxaver' & confirmaver'

firmaver' to the Plaintiff, *Reversion' Tenement' præd'* was double; and for that, was cited *Palmer 62.*

Resp. But to that it was answer'd, that it was single enough, especially as this Case is; for altho' he hath put in all the Words of the Deed, yet it appears plainly, that the Plaintiff relies only on the Release; for it is said, *quod virtute Bargaine & Vendition' & Relaxation' præd' ipse fuit seisit' &c.* and so the matter of the Confirmation is entirely waved. *vid. Br. Tit. double Plea many Cases. Et ideo non allocat' Exceptio.*

fo. 357.

2. That it was not alledged, that Sir Philip Meadows, &c. were seized of the Reversion at the time of the Release.

Resp. That it shou'd be intended to continue being an Estate in Fee, and for that *Plow. 431.* was cited. And it is adjudged in *Cockham and Farrer's Case, 2 Jones, 181, 182.* in a Writ of Error, that an Estate Tail shall be intended to continue, *vid. & nota.* And so it was adjudged between *Birdall and Carew,* and others, enter'd *Pasch. 1 Annæ Reginae, C. B.* in which Case there was an *Avowry* for Rent reserv'd on an Estate Tail, and it was not alledged that the Estate Tail continued.

Where an Estate in Fee shall be intended to continue.

3. That the Pleading in this Case ought to be *quod relaxaver. tot' jus, &c.* and not *quod relaxaver' Reversion' præd.*

To say *quod talis dimisit reversion' terræ & terram cum reverteret,* is all one.

Resp. But to that it was answer'd, That all the Estate which they had in the Reversion was but a Reversion in Fee; and therefore it's all one in Effect, to release the Reversion, and to release all their Right. In *Dier 159.* a. it is said, that to say *quod talis dimisit Reversion' terræ & terram cum reverteret,* is all one. And

Exposition
of the Word
Quendam.

And therefore this Exception was disallow'd by the Court.

4. That the Action is brought by the Plaintiff as Assignee *Philippi Meadows, Mil' &c.* Assignee of *Thomas Ashby* the Lessor: But in the Conveyance of the Reversion by *Ashby* to *Sir Philip Meadows* on Bargain and Sale, which was by Lease and Release, it is said in the Declaration, That the Bargain and Sale was made *inter quosdam Philippum Meadows per nomen Philippi Meadows de &c. Mil' &c.* which are intended to be other Persons than those named before. But it was answered by the Court, That as this Case is, they wou'd not intend a Plurality. Another Reason was given by the Chief Justice, *sed non bene audiui*. But certain it is, that Judgment was given for the Plaintiff by the Opinion of the whole Court. *Darnel* the King's Serjeant and *Lutwyche* for the Plaintiff; *Wright* the King's Serjeant and *Levinz* for the Defendant.

Snow *versus* Franklin.

Trin. 12 W. 3. Rot. 305. C. B.

fo. 358.
Covenant
on an Indenture
between
the Plaintiff
and Defendant.

THE Plaintiff declares, quod cum per quodam scriptum fact' 25 Martii 1695. a great' fuit inter the Plaintiff and the Defendant quod in consideratione that the Plaintiff would permit S. P. to have and enjoy a Farm for a Year and a half, at the Rent of 72 l. per Ann' that the Defendant would pay the Plaintiff 200 l. which were due from the said S. P. to the Plaintiff, and also the said Rent, and do and perform all things to be performed by S. P. The Plaintiff avers that he did permit S. P. &c. and assigns a Breach in Non-payment

ment of the Rent. The Defendant pleads an Accord in Satisfaction of the Covenants before any Breach of the Covenants. Demurrer and Joinder in Demurrer.

The Exception to the Bar was, That the Accord, &c. was pleaded to be in Satisfaction of the Covenants (which were not broke at that time, as the Defendant himself had alledged) and that cannot be, for the Covenants being created by Deed, cannot be discharged but by Deed; but Accord with Satisfaction is a good Plea in Satisfaction, and Discharge of Damages on a Covenant broken; and so was the Opinion of the whole Court, and Judgment given accordingly, against the Opinion in *Rabbet and Stocker's Case*, 2 *Rolls Rep.* 187. And for Authorities in maintenance of this Judgment, *vide* 2 *Cro.* 99. *Olden and Blague's Case*, *Palmer* 110. *Robards and Stoker's Case*, *Co.* 6. 43. b.

fo. 359.
Accord can't be pleaded in Satisfaction of Covenants unbroke, but may in Satisfaction of Damages, &c.

An Exception was taken to the Declaration, That the Plaintiff had not therein shewn the Effect of the Agreement between him and his Tenant *Pendeck*, therein mentioned; *sed non allocatur*; for if Issue shou'd be taken on any thing relating to that Agreement, it might appear on the Evidence. *Lutwyche* for the Defendant.

fo. 360.

Brittin versus Vaux.

Trin. 12 *W.* 3. *C. B.*

THE Plaintiff declares, quod cum per quandam Indenturam fact' &c. he bargain'd, sold and released to J. V. a Messuage, &c. in C. parva, to hold to the said John Vaux and his Heirs. That the Plaintiff warranted the Land,

fo. 360.
Covenant by the Plaintiff against the Defendant, Assignee of J. V. on the Indenture of Release of the and Inheritance.

and covenanted for quiet Enjoyment, and that the said John Vaux shou'd take all the Apples, &c. in another Close adjoining which the Fruit-Trees shou'd bear before, &c. That J. V. covenanted immediately to make a Ditch and Fence, and to maintain it a good Fence for ever: and then assigns for Breach, That the said Fence was ruinous and in decay; and that neither the said J. V. in his Life, nor the Defendant his Assignee after his Death, had preserved the said Fence in good Repair.

fo. 363.

After Verdict for the Plaintiff Judgment was arrested, because the Action lieth not against the Defendant as Assignee, for a Breach in the time of the Assignor; and the Breach being assigned for Default of repairing the Fence, as well in the time of J. V. Assignor to the Defendant, as in the time of the Defendant; and Damages being entirely given, the Plaintiff cannot have Judgment.



DEBT

D E B T.

Sir John Brownlow, &c. Executors, &c.
versus Sir John Hewley, B.

Intr. Hill. 7 W. 3. Rot. 1657. C. B.

THE Plaintiffs declare, That Sir J. W. &c. were possess'd of a Park for 99 Years, and assign'd it to W. L. &c. to hold for the residue of the said Term at the Yearly Rent of 100 l. That 4 Mar. 3 C. 1. Sir J. W. &c. granted to R. Brownlow the said Rent of 100 l. for the residue of the said Term, to which Grant the said W. L. &c. did attorn; That 1 Jan. 1637. R. Brownlow made his Will, and J. Brownlow his Executor; that 20 May, 20 Car. 2. the Estate of the Assignees came to the Defendant; That 3 Sept. 31 Car. 2. the said J. Brownlow made his Will, and the Plaintiffs Executors; That 550 l. of the said Rent for five Years and an half were unpaid 25 Mar. 7. W. 3. per quod Actio &c. The Defendant pleads as to 50 l for half a Year ending 25 Mar. 2 W. & M. that he was ready at the said Park to pay it, &c. and that at any time after it was never demanded on the said Park. And as to the other 50 l. &c. he pleads the same Plea as before. The Plaintiffs demur, for that the Defendant in his several Pleas had not alledged that he was ready to pay the Plaintiffs the Money in his Pleas mentioned, nor had brought it into Court to be paid them.

fo. 364.
Debt for Rent by the Executors of the last Assignee of the Rent, which by the Lessee for Years on the Assignment of his whole Term (quod nota) against the Assignee of the Assignee of the Lease.

In Trinity Term, 1696. Judgment was given for the Plaintiffs by the Opinion of the whole Court, vid. 2 Cro. 423. as to the Tender. Brooke, Tous temps prist, 25. Brooke, Tender, 6, 11, 18, 20.
K THE

fo. 368.

fo. 371.
 Debt for
 Rent by Cestuy
 que Use in Re-
 mainder for
 Life, on a
 Conveyance
 by Lease and
 Release, a-
 gainst the
 Executrix of
 the Lessee.

THE Plaintiff per prox' amicum declares,
 quod cum F. L. in vita sua was seised in
 Fee of a Messuage, &c. and being so seised, did
 the 10th of April, anno Regis nunc 17. by In-
 denture, &c. demise the same to J. H. virtute cu-
 jus J. H. entered, &c. That F. 16 April, an-
 no 19. by Indenture, &c. did bargain and sell to
 M. H. & al. the said Messuage, &c. for 3 Months,
 virtute cuius ac vigore &c. they were possessed.

That 17 Apr. anno 19. the said F. relaxavit &
 confirmavit to the said M. H. &c. habend' to
 them and their Heirs to the Use of the said F. in
 Tail Special, Remainder in Tail General, Remainder
 to the Plaintiff for Life; and afterwards, scil' 26
 June, 1668. died de Reversione præd' seisit' ut
 præfertur, without Heirs of his Body; post cuius
 mortem the Plaintiff was seised, &c. and 10th Aug'
 1668. gave notice to J. H. That J. H. made his
 Will, and constituted the Defendant his Executrix,
 who proved the Will, &c. That the Plaintiff being
 seised, and the Defendant possessed, &c. 80 libr' de
 redditu præd' pro 4 ann' finit' &c. were in Arrear,
 & adhuc insolut' exist' per quod actio &c.

fo. 373.

This Declaration was drawn by Townsend,
 and perused by Sir William Jones, Attorney
 General; and yet, as it seems, there are
 some Imperfections therein.

Relaxavit &
 confirmavit is
 double.

1. Because it is said, that F. relaxavit &
 confirmavit reversionem præd' &c. which is
 double: And for that vid. Lamplugh and
 Shiers's Case before in this Book.

2. Because it is said, that Sir F. L. the Re-
 lessor died seised of the said Reversion ut præ-
 fertur; whereas it is not alledg'd before, that
 he was seised of the Reversion aforesaid by
 virtue of the said Release. And if it had
 been so pleaded, it might have been a Que-
 stion, whether it had been good without the
 Addition

Addition of *necnon vigore Statut' de usibus &c.* If it be necessary to say For in **Snelling and Norton's Case*, 3 Cro. 407. *necnon vigore Statut' de Usibus*, when one it is resolved, on a Motion in Arrest of Judgment, that it is a Fault in Substance; but in *Hob. 310.* it is said by *Hob.* that it need not be so pleaded, because the Statute is a general Law. And so it is adjudged in *Bastard's Case*, Cro. 3. 903 and 917. and so it is held by *Dier* in his Report, fo. 85. b.

A third Reason is, that Notice is alledged in the Declaration; but it is not said by whom, nor to whom, nor of what such Notice was given. But, as it seems, there was no need to alledge any Notice, because that the Estate was executed by the Statute of Uses.

Ange *versus* Patterfon.

Hill. 35, 36 C. 2. Rot. 1757. C. B.

DE BT on a Bond conditioned for Performance of Articles between the Plaintiff and Defendant, by which Articles the Plaintiff was to demise to the Defendant an Inn in K. and among divers other Covenants, the Plaintiff was to serve the Inn with Ale and Strong Beer. The Defendant pleaded Performance generally. The Plaintiff replied that he made the said Demise, &c. and that he was always ready to serve the Inn, &c. But for Breach said, that the Defendant, during the Term, had bought Beer and Ale of other Brewers, and had sold it in the said Inn. To which the Defendant demurred.

fo. 374.
Debt on
Bond for Performance of
Covenants.

K 2

In

* Q. If it should not be *Baker v. Searle*; for there is no such Point in the Case of *Snelling and Norton*, nor is that Case in the same Folio in my Edition, which is printed in 1661.

In this Case the Defendant's Council insisted only, that the Plaintiff ought to have alledg'd that he brought some Beer or Ale for the Defendant to the Inn, and that he had refused to accept it.

But to that the Plaintiff's Council answered, that it would be unreasonable to compel the Plaintiff to carry a thing so ponderous to the Inn, if he did not know that it would be accepted; and that the Defendant was not obliged to accept more than he had from time to time Occasion to use in his Inn; and therefore it was reasonable for the Defendant to give the Plaintiff Notice from time to time, what Quantity his Occasions required, and when it should be brought in; without which it was impossible for the Plaintiff to perform his Covenant with the Defendant. And to prove that, these Cases were cited, *Holder and Taylor's Case, Rolls, 1 Abr. 465.* where it is resolved, that if a Man demise to another a Mill, and the Lessee covenants to repair it from time to time, and the Lessor covenants to find Timber for the Repairs, that the Lessee ought to give Notice to the Lessor, what Timber will suffice. If a Man covenants with another, that he shall have the Disposal of one of his Daughters, the Covenantor is not obliged to deliver any of them to the Covenantee, before he requires one of them to be delivered to him, because he can't tell which of them he will have; *Mo. 72.* by all the Judges. And for the same Reason the Defendant in the Case here, ought to have given Notice to the Plaintiff of the Quantity of Ale and Beer that he should carry in, for that was a thing which could not lie in his Cognizance. Other Cases

Cases were also cited to this purpose, viz. 1 Cro. 571. *Anonimus*. 2 Cro. 432. *Henning's Case*. Hob. 51. *Holme and Twist's Case*. 3 Cro. 249. *Brabel and Hollywel's Case*. Rolls, Tit. Condition, 469, *Harris and Gibbons's Case*. I heard no more of this Case, and the Case was not determin'd on that Argument, and no Judgment is enter'd on the Roll. *Lutwyche* for the Plaintiff.

Duppa & al' versus Stephens.

Hill. 36, 37 C. 2. Rot. 331. C. B.

THE Plaintiffs declare, that the Office of Gentlemen Ushers, &c. is, and a tempore cujus &c. was an antient Office, executed by four Persons nominated by the King, as often as any of them should die or be removed. That the Gentlemen Ushers, a tempore cujus &c. have receiv'd a Fee of 5 l. of every Person who Voluntarily and without Compulsion hath received the Degree of Knighthood, which Degree the King conferred on the Defendant, and he voluntarily accepted it, per quod actio &c. To which the Defendant pleads, that he in sola obedientia to the King's Command, received the said Degree, &c. and thereupon the Plaintiffs demur.

fo. 380.
Debt by the
Gentlemen
Ushers, &c.
for a Fee due
from the De-
fendant when
he was
Knighted.

This Case was argued by *Holt*, the King's Serjeant for the Plaintiff, and by *Levinz* for the Defendant. And for the Plaintiff it was said, that the Declaration was good; for the Office being an Ancient Office, a Fee may belong to it, and then an Action of Debt may be brought for it; and he said the Plea was ill for want of a Traverse, viz. *Absq; hoc quod Def' recepit vel suscepit Gradum Militar' vo-*

fo. 381.

In what Case
a Traverse is
necessary.

lyntarie & sine Compulsione, and without that the Plea was but argumentative at the best, and doth not directly answer the Declaration; for they claim of every one who voluntarily receiveth the Honour. And the Defendant saith, that he received it in pure Obedience to the King's Command, which is no Answer without a Traverse, &c. for if the King commands a thing, and I obey, that Obedience may be without Coertion; for if I had refused, no Penalty shall ensue since the Statute, by which the the Court of Wards is taken away, and the whole rests on the Word *sola*; which imports, that if the King had not commanded, he had not accepted the Honour; and he said that when the Plea is directly contrary to the Matter in the Declaration, it is not good without a Traverse; and for that he cited 3 Cro. 285. and 2 Cro. 657.

Prescript' in
an Office to
be executed
by four to be
named by the
King on
Death, &c.

fo. 382.

Lewinz for the Defendant said, that he took no Exception to the Declaration for the Reasons aforesaid, but only because they prescribed in an Office to be executed by four Persons, to be named and appointed by the King, as soon as any of them four died or was removed; and thereby all the Officers are out, and the Office is determin'd.

And as to the Want of Traverse, he said, that the Word *sola* will make it negative.

The Case was another time argued by *Pemberton* for the Plaintiff, and *George Strode* for the Defendant, and then *Strode* took two other Exceptions to the Declaration, *viz.*

1. That the Plaintiffs have not shewn that the Office was granted to them.

2. That their Names was not well laid; for *Servient' Domini Regis* might be intended the

the King's Serjeant at Law, Serjeant Trumpeter, or any other of the King's Serjeants.

But notwithstanding these Objections, the Court was of Opinion the Action lay, that the Declaration was good, and that the Plea was ill for want of a Traverse, and that the Plaintiffs should have Judgment; but no Judgment is enter'd on the Roll.

As to the Traverse, it is now adjudged in Sir R. Bowy's Case, 1 Ventr. 211. and 217. that in an Action for an Escape, if the Plaintiff declares on a voluntary Escape, and the Defendant pleads that he retook the Prisoner on fresh Pursuit, the Defendant need not traverse the voluntary Escape, because it was not necessary to the Action, and it was impertinent to alledge it in the Declaration, and out of time to put it in the Declaration; but it was to come in by the Replication.

In what Case a Traverse is not necessary.

But in the Case here, the voluntary Acceptance of the Honour without Compulsion, is the Essence of the Action, and so not like to an Action of Escape. Judgment was given for the Plaintiff.

Mitchel *versus* Pope.

Mich. 1 Jac. 2. Rot. 565. C. B.

DEBT on a Bond to perform an Award, by which the Defendant was to pay the Plaintiff 250 l. in full Satisfaction of his Part and Share of the Estate of H. P. part of it to be paid 24 Dec. then next, 100 l. 25 March following, and 100 l. the Residue, on 29 Sept. next following. Bar per nul Agard fait. The Breach assign'd by the Replication was, that the Def. had not paid the said 100 l. 25 March. Rejoinder, That the said H. P. made a

fo. 382.

Debt on a Submission-Bond.

Nuncupative Will, and his Wife and M. the Plaintiff's Wife Execut' And that the Plaintiff's Wife died before the Submission; and that there was a Dispute between the Plaintiff and the Defendant concerning all the personal Estate of the said H. P. which was submitted, &c. And the Award was not made of all the personal Estate. To which Rejoinder the Plaintiff demurs.

fo. 385.
What shall
be reckon'd a
Departure.

It was objected in this Case by the Plaintiff's Council, that the Rejoinder was a Departure from the Bar, because the Defendant by the Bar affirms that no Award was made; and by the Rejoinder, by a strong Implication, it is confess'd, that the Arbitrators made an Award; but that it was not made of all the personal Estate of *Henry Paine*; and for that these Cases were cited, 2 *San.* 489. *Roberts v. Marriot.* 1 *Sid.* 180. *Morgan v. Man,* *Keilway* 175. pl. 8.

The Second Objection was, That the Rejoinder was apparently false; for thereby it is said, that the Award was not of all the personal Estate of *Henry Paine*, whereas by the Award 250 *l.* is awarded to be paid to the Plaintiff, and as his Moiety, Portion, Part and Proportion of the personal Estate of the said *Henry Paine*: Which is to be intended also to be in Satisfaction of his Share of all the said personal Estate. And it is further awarded, that on Payment of the said 250 *l.* the Parties shall give general Releases the one to the other, whereby a final Award is made as to all the personal Estate of the said *Henry Paine*.

fo. 386.

The Court was clearly of Opinion, that the Award was a full and final Award; and also it seem'd to them, that the Rejoinder was a Departure from the Bar; and the Plaintiff had

had Judgment. *Lutwyche* for the Plaintiff.

Elwes versus Vaughan.

Hill. 1 & 2 Ja. 2. Rot. 381. C. B.

DEBT on a Bond of Apprenticeship, and among other Things the Condition was, that the Apprentice from time to time, on reasonable Request, should give a just Account, &c. The Defendant pleaded Performance Specially, and the Plaintiff assigned a Breach, that such a Day at H. in partibus transmarinis such Goods came to his Hands, and that he was requested to give an Account thereof, &c. And to this the Plaintiff demur'd.

fo. 386.

Debt on a Bond with a Special Condition for the faithful Service of an Apprentice.

These Exceptions were taken to the Replication.

fo. 389.

1. That it is not said therein, what Person made the Request to the Apprentice to account, &c. nor to what Person to give it, nor to give it in Writing according to the Words of the Condition.

2. That the Cloths by the Replication, supposed to come to the Hands of the Apprentice, and for which he had not given any Account, were delivered to him at *Hamburg in partibus transmarinis*; so that if Issue should be taken thereon, there could be no Trial.

3. That by the Replication a Request is alleged to account, and the Apprentice *ad hoc* & *ibidem* recusavit; but it is not said, & *ad hoc* recusat; and the Condition is, to account on a reasonable Demand. And for these Causes the Replication was held to be ill. But a Rule was made to plead, so that the Cause might be tried.

Strong

Strong *versus* Saunders.

Hill. 2 & 3 Jac. 2. Rot. 1789. C. B.

fo. 389.
Debt on a
Submission-
Bond against
an Executor.

DEBT on a Bond to perform an Award, brought against an Executor, by which, inter alia, it was awarded, that the Defendant's Testator, on the Delivery of the Award, should pay the Plaintiff 22 l. 2 s. 10 d. $\frac{1}{2}$. The Defendant pleaded, Nulla agard fait. The Plaintiff replied, that the Award was delivered such a Day, and assigned the Breach for Nonpayment of the Money on the Delivery; to which the Defendant demurred.

fo. 393.
An Award
to pay on De-
livery, Breach
that he did
not pay on
Delivery,
good, with-
out saying *vel*
unquam postea;

The chief Matter which was insisted on by the Defendant was, that the Breach was not well assigned by the Replication; because altho' the Award is, that the Defendant should pay the Money on the Delivery of the Award to him, yet the Law, by a reasonable Construction of the Award, would allow him a reasonable Time to pay the Money; for otherwise the Award may be deliver'd to him on his Journey on the Highway, at a great Distance from his Habitation, at which Place and Time it can't be presumed he hath Money to pay, 18 E. 4. 21 Pl. 31. Rolls Condit. 443. nu. 3 and 4. And if it shall be so, that the Defendant shall have a reasonable Time after the Delivery of the Award to him, to pay the Money; then it follows, that the Breach assigned by the Replication is too strict and narrow, and that the Breach ought to have been assigned, that the Money was not paid *super deliberation' arbitrii præd' vel unquam postea*. By the Opinion of the greater part of the Court was, that the Breach was well assigned, and

fo. 394.

that it shall not be intended that the Money was paid after; and if it had been paid in a reasonable time after, that ought to have been pleaded by the Defendant; and the Plaintiff had Judgment.

For that ought to be shewn on the other side.

Brown *versus* Walker.

Hill. 2, 3 Jac. 2. Rot. 1919. C. B.

IN Debt on a Bond to perform Covenants in a Lease for Years of several Mills, made by the Plaintiff to the Defendant by Indenture, the Defendant sets forth the Indenture by which the Plaintiff covenanted with the Def. to provide and allow him Divers Things by name, and also Master-Timber to repair the said Mills; and by a distinct Covenant the Defendant covenanted to repair the Mills; and then pleads general Performance. The Plaintiff replies, that the Defendant had permitted the Mills to be in Decay, and shews in what particulars. The Defendant rejoins, that he had requested the Plaintiff to allow him Master-Timber, &c. which he refused to do; and thereupon the Plaintiff declares.

fo. 394.
Debt on a Bond to perform Covenants in a Lease.

The Court was divided in Opinion, whether the Covenants were Reciprocal or Conditional. That they were Reciprocal, these Cases were cited, 3 Leon. 219. Brocas's Case. 7. 10. b. in Ughtred's Case. 1 Rolls Abr. 414. 11. T. nu. 5. 416. nu. 15. Bragg and Nightingale's Case. 1 Saund. 319. 2 Saund. 350.

fo. 398.

What Covenants are reciprocal Covenants.

Kegg & Collington *versus* Horton.

Mich. 3 Jac. 2. Rot. 534.

fo. 399.
Debt on a
Bond to in-
dempnify the
Plaintiffs
from a Bail-
Bond.

DE B T on a Bond, dated 10 Jan. 33 C. 2. with Condition to save the Plaintiffs harmless, being Bail for one L. at the Suit of W. the Defendant pleads non dampnificat', and the Defendants reply, that the said W. in Mich. Term. 33 C. 2. sued L. in the Exchequer; That the Plaintiffs in Hill. Term. 33 & 34 C. 2. became Bail for L. and aver, that the Action and Bail mentioned in the Condition and in the Replication, are the same; Quodque post Veredictum & ante Judicium præd' versus præd' L. ad sectam præd' W. fidei præfertur obtent' scil' such a Day, W. died intestate, and Administration was granted to G. by the Bishop of Lincoln; That the Defendant had not paid the Condemnation, and that the Plaintiffs had paid 23 l. 10 s. to the Administrator. To which the Defendant demurs.

fo. 401.

These Exceptions were taken to the Replication.

1. That it appeared on the Record, that Wynn was dead before the Judgment.

Salk. 40.

2. That the Judgment being at Westminster, the Letters of Administration granted by the Bishop of Lincoln were void, and by Consequence the Money paid to Goodband was in his own Wrong.

3. That it appears, that the Bail mentioned in the Condition, can't be the same Bail that is mentioned in the Replication; for the Condition recites, *Whereas the Plaintiffs are become Bail*, and the Bond bears Date 10 Jan. 33 C. 2. which was before Hillary Term; and the Replication saith, that the Plaintiffs be-

came

came Bail in *Hillary* Term, 33 & 34 C. 2. which was after the making of the Bond. Judgment for the Defendant.

The Mayor, &c. of Cambridge, v. Herring.

Hill. 1 & 2 Ja. 2. Rot. 1534. C. B.

fo. 402.
Debt for
10 l. for the
Breach of a
By-Law.

DEBT for the Breach of a By-Law made by the Corporation of Cambridge, which had *avers Charters, &c. and one after the making of the By-Law, &c. By which By-Law it was ordained, that if any of the Common Council should voluntarily resign, &c. he should immediately pay 10 l. to the Use of the Corporation; That the Defendant had resigned, &c. and had not paid, &c.*

After Verdict for the Plaintiffs, it was moved in Arrest of Judgment,

fo. 405.

1. That no Resignation could be made, but to the Mayor, &c.

2. That the Resignation ought to have been by Deed; for the Defendant had Freehold.

3. That no Notice was given the Defendant of the By-Law, and that he was no member of the Corporation at the time the By-Law was made.

4. That the Corporation which was when the By-Law was made, was dissolved by the Charter.

But all the said Exceptions were over-ruled, and Judgment was given for the Plaintiff.

Burbridge

Burbridge *versus* Clayton.

Hill. 1 & 2 Jac. 2. Rot. 1075. C. B.

fo. 406.
Debt on Bond
brought by
the Plaintiff
as Admini-
strator of R.
C. unadmini-
strated by A. C.
his Relict, &c.

THE Plaintiff declares, quod cum Will Clayton (the Defendant's Testator) such Day, &c. per scriptum suum oblig' concessisset se teneri Roberto Clegg in 200 l. &c. præd' tamen Will. in vita sua, and the Defendant since his Decease have not paid the said Robert in his Life, or the said A. C. after his Death, the Plaintiff to whom Administration was granted of the Goods within the peculiar of the Mannor of M. (within which the Bond was) by W. C. Commissio &c. de jure pertinuit. The Defendant pleads (protestando that the Bond was made within the Peculiar) that the said W. (and so mistakes William for Robert the Plaintiff Intestate) was alway resident at W. out of the peculiar Jurisdiction. The Plaintiff protestando that the Bond was made within the Peculiar, replied that as well at the time of R. C.'s Death, as at the time Administration was granted, the Bond was within the peculiar Jurisdiction. To this the Defendant rejoins, and only repeats the Bar; whereon the Plaintiff demurs.

fo. 408.

The only Exception which was taken by the Defendant's Council to the Declaration was, because it was not shewn what Authority he who committed Administration to the Plaintiff, had to do it.

But to that it was answer'd, That it was alledg'd in the Declaration, that Comm' Admin' illius illi de Jure pertinuit; and that this is sufficient, is proved by the common Exception in such Cases, viz. that it was not shewn that he who committed the Administration

loci illius Ordinar' nec quod Commissio &c. illi pertinuit, as it is in *Morgan and Williams's Case*, 3 Cro. 431. in *Skudmore and Wenston's Case*, 3 Cro. 879. and in *Chard and Bird's Case*, 3 Cro. 838.

See now for that Matter the Case of *Dring and Respas*, 1 Lev. 193. where the like Exception is taken. And in the Report of that Case, in *Keb. 125 and 152*. it is said by *Twissden & Cur'* that in a Bar it ought to be said, *cui Admin' pertinuit*, especially in a Peculiar. And in *Clementson and Mountford's Case*, *Stiles 106*. it is said by *Rolls*, that in a Declaration it need not be said that Administration was granted *loci Ordinar'*, *aut cui pertinuit &c.* altho' it ought to be so pleaded in a Bar.

How to
plead a Grant
of Admin' by
a Peculiar.

It was also said, that if it had been *loci illius Ordinar'* it had been good, as is proved by 5 H. 6. 46. a. where it was pleaded, that Administration was granted by the Abbot of *Westminster*, *loci illius Ordinar'*. An Exception was taken that it was not shewn that the Abbot had any Power, either by Grant or Prescription, to grant Letters of Administration, but yet on Demurrer it was adjudg'd good; and to say that *Commissio &c. de Jure pertinuit* is tantamount.

It was also insisted, that the Defendant by the Bar had confessed that there was such a Peculiar Jurisdiction by pleading that the Infeudate died out of the Jurisdiction.

The whole Court was of Opinion that the Declaration was good, and the Plaintiff had Judgment.

Terry

Burbridge *versus* Clayton.

Hill. 1 & 2 Jac. 2. Rot. 1075. C. B.

fo. 406.
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brought by
the Plaintiff
as Admini-
strator of R.
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It was also insisted, that the Defendant by the Bar had confessed that there was such a Peculiar Jurisdiction by pleading that the Inestate died out of the Jurisdiction.

The whole Court was of Opinion that the Declaration was good, and the Plaintiff had Judgment.

Terry

How to
plead a Grant
of Admin' by
a Peculiar.

Terry *versus* Wade.

Pasch. 2 Jac. 2. C. B.

fo. 409.
Debt for
500 l.

DE B T on Bond to pay 253 l. &c. 11 March next, &c. giving ten Days Notice, at the House of P. Wade in Lombard-street. After Oyer, the Defendant pleaded that the Plaintiff gave no Notice. The Plaintiff, by his Replication, said only that the Defendant hath not paid the Money according to the Form of the Condition. The Defendant rejoined and said ut supra, and thereupon the Plaintiff demurred.

fo. 410.

Judgment was given in this Case for the Plaintiff for two Reasons.

A. is bound to pay Money to B. on such a Day, giving 10 Days Notice at the House of B. by whom such Notice is to be given.

1. Because 'twas held by the Court, that the Notice was to be given by the Defendant. The Difficulty of the Matter consisted in this, that the Defendant was bound in the Obligation by the Name *Petri Wade de London Aurifabri*, and the Condition of the Obligation is to pay the Money at the House of *Peter Wade in Lombard-street, London*, which may be the Defendant's House; and it would be strange that the Obligor should give Notice at his own House of the Payment of the Money to be made to the Obligee; but the Court would not intend it, because it was not said in the Condition, that the Money was not to be paid at the House of the *aforesaid* or of the *above-bounden Peter Wade* and therefore they would the rather intend it to be the House of another Man, especially it not appearing that the Defendant's House was in *Lombard-street*. But admitting it might be intended, that the Notice was to be given at the Defendant's House; yet it

not a Matter so strange, but that it may be true : For perhaps the Defendant, in respect of the great Business he had as a Goldsmith, could not go from his House to give Notice, but that the Plaintiff was to come to the Defendant's House the 10th Day, before the 11th of *March* in the Condition, to know if the Defendant would pay the Money on the Day in the Condition.

Another Reason was, because it could not be intended, that it was the Intent of the Parties that the Money should be lost for want of Notice : But admitting that it was incumbent on the Plaintiff to give the Notice, yet the Defendant's Plea was ill, because it was pleaded in Bar, where it ought to have been only in Abatement. And for that see the Case of *Lawson and Widrington*, which is now reported *Lev. 1. Rep. 85. Raymond 61. and 1 Keb. 380.* where it is so resolved in the like Case.

fo. 411.

Tonstall & Kath. *Ux'* versus Williamson.

Hill. 3 & 4 Jac. 2. Rot. 345. C. B.

DEBT by Baron and Feme on a Deed obligatory, reciting that the Defendant, on the Grant of such an Office, had, by the King's Command, secured by Bond to the Plaintiff Kath. dum sola 50 l. per Ann' &c. that the said Grant by the Demise of King C. 2. was determined ; that he was a Petitioner for a new Grant of the said Office, and King James 2. order'd the continuance of the Payment, &c. The Defendant by the said Writing promis'd, that as soon as the said Grant should pass the Great Seal, he would execute to the Plaintiff Kath. a new

fo. 413.
Debt on a
Deed obligatory.

L Bond,

Terry *versus* Wade.

Pasch. 2 Jac. 2. C. B.

fo. 409.
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fo. 410.

Judgment was given in this Case for the Plaintiff for two Reasons.

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1. Because 'twas held by the Court, that the Notice was to be given by the Defendant. The Difficulty of the Matter consisted in this, that the Defendant was bound in the Obligation by the Name *Petri Wade de London Aurifabri*, and the Condition of the Obligation is to pay the Money at the House of *Peter Wade in Lombard-street, London*, which may be the Defendant's House; and it would be strange that the Obligor should give Notice at his own House of the Payment of the Money to be made to the Oblige; but the Court would not intend it, because it was not said in the Condition, that the Money was not to be paid at the House of the *aforsaid* or of the *above-bounden Peter Wade* and therefore they would the rather intend it to be the House of another Man, especially it not appearing that the Defendant's House was in *Lombard-street*. But admitting it might be intended, that the Notice was to be given at the Defendant's House; yet it

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Another Reason was, because it could not be intended, that it was the Intent of the Parties that the Money should be lost for want of Notice: But admitting that it was incumbent on the Plaintiff to give the Notice, yet the Defendant's Plea was ill, because it was pleaded in Bar, where it ought to have been only in Abatement. And for that see the Case of *Lawson and Widrington*, which is now reported *Lev. 1. Rep. 85. Raymond 61. and 1 Keb. 380.* where it is so resolved in the like Case.

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fo. 413.

Debt on a Deed obligatory.

L

Bond,

Bond, &c. that after, &c. the said new Grant, &c. did pass the Great Seal; that the Defendant hath not executed to the Plaintiff Kath. dum sola, or to the Plaintiffs post disponsalia, any Bond per quod Actio &c. Demurrer and Joinder in Demurrer.

fo. 415.

An Exception was taken by *Inglesby* to this Declaration, viz. That it is averr'd that the Defendant hath not seal'd or executed to the Plaintiff *Kath.* when sole, or to the Plaintiffs after their Marriage, the Bond. But it was not said that the Defendant had not Seal, &c. to the Plaintiff *Kath.* after the Marriage. And that was held a good Exception *per totam Curiam.* But the Plaintiffs had leave to amend.

Parkes *versus* Middleton.

Trin. 4 Jac. 2. Rot. 1690. C. B.

fo. 419.
Debt for
10 l. on Bond.

DE B T on Bond, dated 5 March 4 Jac. 2. to pay to the Plaintiff, or H. his Attorney, all the Costs of a Suit then unpaid with which the said H. should charge the Plaintiff and discharge the Plaintiff therefrom. The Defendant pleads Payment according to the very Words of the Condition. The Plaintiff replies, that before the Original, scil' 10 March, 4 Jac. 2. the Attorney charg'd him with 4 l. 16 s. &c. and that the Defendant had not paid that Sum or discharg'd him. To this the Defendant rejoins, and says that the Attorney hath not deliver'd him any Bill of Costs, &c. whereupon the Plaintiff demurs.

fo. 421.

Where the

Law will allow a concise Manner of Pleading, and where not.

The Court was of Opinion that the Bar was not good, because it was too general; for it ought to have shewn that the Attorney charged

charged so much and no more, and that he had paid it, &c. It was agreed, that when a Matter tends to great Prolixity, that for avoiding thereof a more concise manner of Pleading ought to be admitted; but the certainty of Pleading in this Case doth not tend to any such thing: And for Authorities to prove this Diversity these Cases were cited, 3 Cro. 253. *Aston's Case*. A Sub-Collector of Subsidies was bound to give a sufficient Account in the *Exchequer* of all Sums receiv'd by him; it is sufficient to plead according to the Words of the Condition. So if a Man be bound to deliver to *J. S.* all the Fat of all the Beasts which should be killed by him, 3 Cro. 149. *Mint and Bethil's Case*, and other Cases to that purpose. But if a Man promise to deliver to *J. S.* all the Corn in his Barn, it is not sufficient to say that he hath deliver'd all, &c. 1 *Rolls Rep.* 382. *White's Case*. So if a Man be bound to deliver to *J. S.* all the Money in his Purse, &c. 9 *E. 4.* 14 & 15. and so is 16 *H. 7.* 4. a. If a Man be bound to pay Money so soon as *J. S.* shall come of Age, he can't plead that he paid it *tam cito* &c. 2 Cro. 359. *Halsey and Carpenter's Case*. And in that Case another Case is cited to be adjudg'd, that if a Man be bound to pay all the Legacies in a Will, it is not sufficient to say that he paid all, &c. *Latch.* 16. *Wilkinson's Case*, 4 *H. 7.* 12. and several other Books. Then it was objected, that the Replication was ill; for it was that the Defendant had not paid the Charges, and also that he had not saved the Plaintiff harmless. *Curia*, it is single enough, for by the Intent of the Condition Payment is a Discharge, and if it was double the Defendant can't take Advantage

Bond to pay the Costs of such a Suit. Breach that the Def. hath not paid them fo. 422. nor discharged the Pl. is not double.

thereof, unless by Demurrer for that Cause. Three of the Judges were of Opinion, that a good Breach was well assign'd by the Replication, which as *Levinz*, of Council with the Plaintiff, of his own Accord confess'd ought to be, the Condition being to do a collateral Act, and not to pay Money Parcel of the Obligation. But the other Judge doubted that it was too general, because the Condition is to pay all the Charges, &c. which were unpaid at the time of the making of the Bond, which was 5 Mar. 4 Jac. 2. And the Plaintiff by his Replication saith, that 10 *ejusdem Mensis* the Attorney charg'd him with 4 l. 16 s. and the Defendant had not paid them to him. But it is not averr'd that so much of the Charges was unpaid at the time of the making of the Bond.

What shall
be accounted
a Departure.

They all agree, that the Rejoinder was a manifest Departure from the Bar; for thereby he saith that he paid all the Charges, &c. And in his Rejoinder he would excuse the Non-payment by reason a Bill of Charges was not deliver'd him; which Cause was also impertinent, for neither the Condition nor the Nature of the Matter required any such thing. The Plaintiff had Judgment.

Rossell *versus* Rossell.

Mich. 3 Jac. 2. Rot. 646. C. B.

fo. 422.
Bond of Non-
gint' & octo-
gesimis libris
to pay 490 l.
is a good
Bond.

DE B T for noningent' & octogint' libris brought against the Defendant as Executrix of Gervas Rossell. The Defendant craves Oyer of the Bond (whereby it appear'd that the Testator

was bound to the Plaintiff in nongint' 3: octogessimis libris) and pleads Variance between the Declaration and the Bond: Upon this the Plaintiff prays that the Condition may be entred on Record; which being granted, and it appearing to be for Payment of 490 l. he thereupon demurs.

Judgment for the Plaintiff. And for this Case, *vid.* Rolls 2 Abr. 147. nu. 6, 11, 14, 15, 16, 17, 19. 2 Cro. 208. 290, 338, * 602. Cro. El. 896. Cro. Car. 386. Hopehill and Searle's Case. Hob. 18, 19, 116, 119. Mod. 864.

fo. 424.
Cro. Ja. 261.
Salk. 462.

Lovelace *versus* Bickham.

Trin. 2 Ja. 2. Rot. 1870. C. B.

DEBT on Bond to indemnify the Plaintiff from certain Mariners Tickets deliver'd to the Defendant. Bar, that he had indemnified the Plaintiff. Replication, that he was arrested, &c. and had spent 20 s. for his Discharge. Rejoinder, that the Plaintiff had falsly procur'd himself to be arrested, with a Traverse that he was arrested aliter &c. Demurrer because the Rejoinder was a Departure.

fo. 424.
Debt for
200 l. on
Bond.

Two Exceptions were taken to the Bar.

1. That to plead *quod indemnem conservavit* Quer' was too general, and that the Plea ought to have shewn how he had saved him harmless. And for that Co. 2. 4. a. 2 Cro. 363. 3 Cro. 253. 5 E. 4. 8. were cited as Authorities in point.

fo. 428.

But the Court gave no Resolution to that Exception, nor was it necessary to do it as this Case was. But as it seems

*Indemnem
conservavit,
without
shewing
no how, good
on a general
Demurrer.*

L 3

* 2. If it should not be 603. Pl. 28.

no Advantage could be taken thereof without a special Demurrer, and that it was now vain by the Replication, as it is held by the

Where the Court in the Case of *Cutler and Pafte v. Southern and Halker*, 1 *Lev.* 194.

Mistake of the Plaintiff's Christian-Name in a Bar will not vitiate it. 2 *Except.* That the Name of the Plaintiff in the Bar is mistaken; for it is said *quod præd' Thomas* (the Defendant) *indempn' confervavit præd' Henry Lovelace*, whereas it ought to have been *præd' Christopherum*.

Cro. El. 497. Pl. 7. But that was easily over-rul'd, because no such Person was named before, and then the Word *Henricum* would be void, and then *præd' Lovelace* would be sufficient; as *Yelv.* 182. *Savil* 71. and diverse other Books are.

What shall be accounted a Departure. But then an Exception was taken to the Defendant's Rejoinder, *viz.* that it was a Departure from the Bar; for by the Bar he had pleaded, that he had indemnified the Plaintiff; and by the Rejoinder he doth confess, that the Plaintiff was arrested (and so by Consequence damnified) but that it was by the Plaintiff's own Procurement. And that was ruled to be a good Exception, and the Plaintiff had Judgment.

Note, The Plaintiff in his Replication saith, that he was arrested by Virtue of Process out of *B. R.* but saith not in what Place the Court was held at that time: but no mention was made of that Exception. But, as it seems, that Fault was aided by the Rejoinder, whereby the Defendant confesses that the Plaintiff was arrested, &c.

Young *versus* Johnson.

Hill. 2 & 3 Jac. 2. Rot. 1918. C. B.

DEBT on Bond, Bar that the Intestate was bound in a Recognizance, in the Nature of a Statute Staple, to one El. Oldfield, of 600 l. payable at the Feast of St. James the Apostle then next, and that it was for a just and true Debt, &c. and that plene administravit præter Goods to the Value of 12 d. &c. The Plaintiff replies, an Ex-tent issued on which an Inquisition was taken, whereby it was found that the Cognusor was seised, &c. of a Capital Messuage, &c. that a Liberate afterwards issued, which Writ the Sheriff return'd; that he had deliver'd, &c. and that the Cognusee was, and is possessed thereof. To this the Defendant demurs.

fo. 429.
Debt on
Bond against
an Admin'

These Exceptions were taken to the Bar.

Except. 1. That the Plea saith, that *Recogn' fuit debito modo capt'* but doth not say how.

fo. 435:

To which the Defendant's Council answer'd, that it is said that *fuit capt' coram Vaughan* Chief Justice, and *secundum formam Statut'* which is sufficient.

2. It is not said that it was *per scriptum Obligator'* &c.

Resp. It is said, *quod per Recogn' in natura Statut' stapul' recognovit &c.* which is sufficient.

3. It is not said that the Statute was enroll'd according to the Form of the Statute, &c. and so void.

Resp. The Statute of 27 El. extends only to Purchasers of Land, and not to Creditors.

4. That by any thing that appears the Debt may be satisfy'd.

L 4

Resp.

Hard. 78.

Resp. It is said that it was not satisfy'd by the Cognusor or by the Defendant, and it can't be satisfy'd by the Extent; for the Debt is 300 l. and the *Liberate* did not issue till the 2 *Ja.* and the Lands are but of the Value of 50 l. *per Ann'* and therefore it shall not be intended to be satisfy'd.

5. It is said that the Statute remaining unsatisfy'd: but it is not said at what Place.

fo. 436.

If a Statute be once extended, the Cognise shall not resort to the personal Estate.

Resp. That it need not; for if it be unsatisfy'd, it remains in all Places unsatisfy'd; and moreover, no Issue is to be taken thereupon. But the Plaintiff by Replication ought to shew how it is satisfy'd; and further, such Recognizance is never produc'd in Pleading.

These Cases were cited for the Plaintiff as to Matter of Law, *viz.* 2 Cro. 338 and 693. 1 Sid. 356. nu. 8. 3 Cro. 310. *Hungar's Case*, and the Plaintiff had Judgment. And beside these Cases cited on the Argument of this Case, *vid.* 22 E. 3. 14 nu. 42 *Fitzh. Execut'* 84. and 3 *Lev.* 219. *Barker v. Dye*, where the like Judgment is given as in the Case here.

Watts & al. versus Pitts & al.

Mich. 1 *Fac.* 2. *Rot.* 354.

fo. 436.
Debt for
200 l. on Marriage-Articles.

DEBT on Marriage-Articles, which being almost insensible, I have here inserted them at length, *viz.* Articles of Agreement made, &c. between Richard Pitt of, &c. and Richard Pitt his Son of the one part, and John Watts, Ann his Wife, and Thomas Watts their Son of, &c. of the other part. That whereas there is an intended Marriage

riage shortly to be solemnized between Thomas Watts abovesaid and Elizabeth Pitt, Daughter of the abovesaid Richard Pitt the Elder, and for and in Consideration of the Sum of 100 l. of lawful English Money, paid by Richard Pitt the Elder, or Richard Pitt his Son, their Executors, Administrators or Assigns, at the Days of Payment hereafter mention'd, unto John Watts or Thomas Watts abovesaid, their Executors or Assigns, or either of them, viz. that is to say, in, at, or upon the 26th Day of March next ensuing the Date hereof, the Sum of 50 l. of lawful English Money, and the like Sum of 50 l. in, at, or upon the 29th Day of September, which will be in the Year of our Lord 1681. Secondly, it is articulated, covenanted and agreed, by John and Thomas Watts abovesaid, to and with Richard Pitt the Elder and Richard Pitt the Younger, their Executors and Assigns, that for the Consideration abovementioned, the said John and Tho. Watts shall convey, settle, and assure unto Elizabeth Pitt aforesaid, and to the Heirs of her Body begotten by Thomas Watts here mentioned, 20 l. per Annum in Jointure for her the said Elizabeth, and for want of Heirs begotten by Thomas, then to the right Heirs of Thomas Watts for ever. And this to be done by learned Council in the Law, by Conveyance to such Feoffees as Richard Pitt and Thomas think fit, and the Residue and Remainder of the Estate to be conveyed by John and Thomas Watts to Thomas and his Heirs for ever. And this to be done at the charges of Richard Pitt, not exceeding the Charge of a Fine. Thirdly, it is articulated, covenanted and agreed, that the said John Watts and Ann his Wife shall set over all their Stock of Cattle, Crop of Corn, all manner of Household-Goods within Doors and without, unto Thomas Watts their Son, and to his Executors and Assigns for ever, except the one Moiety of the Household-Goods

Goods for and during the Natural Life of John and Ann his Wife, for their convenient Use. Fourthly, it is articulated, covenanted and agreed upon, that the said Thomas Watts and Elizabeth his intended Wife, shall maintain and keep John Watts and Ann his Wife, Father and Mother to the said Thomas, and John Watts his Grandfather, sufficient Meat, Drink and Apparel, Washing, Wringing, and all other Necessaries fit and convenient for People of their Quality and Calling, and likewise to pay unto John and Ann, or either of them, the Sum of 4 l. yearly, and every Year during their natural Lives, at two Days of Payment, by even and equal Portions, that is to say, the 25th Day of March and the 29th Day of September in every Year. Now if the said John and Ann Watts shall mislike with their Meat, Drink, Washing, Wringing, &c. aforesaid, then the said Thomas and Elizabeth his Wife, or the Heirs, Executors, Administrators, or Assigns of Thomas Watts, shall pay, or cause to be paid unto John and Ann Watts aforesaid the Sum of 15 l. by the Year, and every Year during their natural Lives, by even and equal Portions, at the Days of Payment in every Year as aforesaid. If John Watts his Grandfather mislike, he is to be paid 8 l. of current English Money, at two Days of Payment, by even and equal Portions, in every Year as aforesaid. And if it shall happen that the said John or Ann happen to depart this Life from each other, then if the Survivor living mislike with Meat, Drink, &c. then Thomas Watts, his Heirs or Assigns, shall pay the Sum of 8 l. yearly, and every Year during his or her natural Life, by even and equal Portions, at the Days in every Year as is abovementioned. Fifthly, it is articulated, covenanted and agreed upon, that Thomas Watts, his intended Wife, and the Heirs and Assigns of Thomas, shall permit and suffer his Father and

and Mother, John and Ann, to have the Chamber over the Hall, to his or their Use, for and during their Lives, and the longer Liver of each of them. And lastly, for the due Performance of all and singular the Articles, Promises, and Agreements, we bind our selves, our Heirs, Executors, Administrators and assigns, and every of them, in the Sum of 200 l. of lawful Money of England, to be forfeited upon due Proof of any part of these Articles, of either Side or Part abovementioned. Unto which we have interchangeably put our Hands and Seals the Day, Year and Month first above written. The Plaintiffs aver that the Marriage did take Effect, and assign Breach in Nonpayment of the 50 l. on the 29th of September. To which the Defendants demur.

In this Case the Defendant's Council objected,

fo: 441.

1. That no Action lies on that Part of the Articles, whereby the Parties oblige themselves in 200 l. because it is not said to whom they obliged themselves, or that they themselves are bound to perform the Covenants in the Articles, or to pay 200 l. for Breach of the Articles; but only in 200 l. to be forfeited on due Proof of any part of the Articles: And also, because one of the Parties was a Feme Covert at that time, and could not oblige her self. *Sed non allocatur*; for the Deed shall be construed according to the Intent of the Parties, and shall not be void in that part, if by any reasonable Means it may be taken to be good; and the Covenants being mutual by the several Parties of the several Parts of the Articles, it shall be taken, that the several Parties of the several Parts of the Articles, which were capable of binding themselves the one to the other, have bound themselves in the said 200 l. to perform

perform their mutual Articles, and to forfeit the said 200 l. on Proof of Breach of any of the said Articles; and otherwise that part of the Articles would be vain and absurd. And for that, *vid.* 3 Lev. 21. *Langdon v. Goole.*

Where
Proof may be
in the same
Action.

2. That there ought to have been Proof of a Breach of some of the Articles before the Action was brought. *Sed non allocatur;* for the Proof may be in this same Action. And so are *Alderred* and *Matthews's* Case, 2 Cro. 188. and *Elve* and *Save's* in the same Book, 232. and many other Books. And the Plaintiff had Judgment by the Opinion of the whole Court. *Lutwyche* for the Plaintiff.

Note, that no Regard was given by the Court, to the Variance between the Declaration and the Articles, because the Recital in the first part of the Articles was nonsensical.

Smith & al' versus Boughton.

Trin. 4 Jac. 2. *Rot.* 1663. C. B.

fo. 442.
Debt against
an Heir on
his Father's
Bond.

DEBT by an Executor against an Heir on his Father's Bond. Bar per Riens per Discent, except a Reversion on a Lease for Years, made by his Father. Demurrer, for that the Bar don't confess the Debt. 2. That nothing is shewn whereby it may appear that the Lessee accepted the Lease as Entry. 3. That it is not said that the Reversion descended to him.

fo. 444.

In the Argument of this Case, the Plaintiffs Council insisted on the Exceptions mentioned in the Demurrer.

1. That

1. That the Defendant had not confessed the Debt according to all the Precedents in the like Case.

2. That the Defendant had not shewn any thing whereby it might appear that the Lessee had accepted of the Lease, as by Entry, and before Entry there is no Reversion, and by Consequence the Fee simple descended to the Defendant.

3. That it is not shewn that the Reversion did descend to him.

Resp. 1. As to the first the Defendant's Council answered, that what is not denied, is confessed, and there is no Necessity that it should be expressly confessed by a direct *bene & verum est*.

fc. 445.

2. As to the second it was answered, that the Lessee might enter when he pleased; and if there was no Demise, the Plaintiff might plead it.

3. As to the third, it was only said that it was well enough.

But note, That it is expressly alledged, that he never had any Lands, &c. by Descent from his Father, *præter Reversion' præd'* and then in the Conclusion of his Plea he Demands Judgment, *Si ipse de debito præd' præterquam in Reversion' & Reddit' præd' onerari debeat*, which are strong Implications that there was such Demise, and that the Lessee had entered, and that there was such Debt due to the Plaintiff. But it was adjourn'd, & *quid inde venit nescio*, for it was not argued after.

Bell *versus* Bolton, Admin' of M. Tolley.

Mich. 3 Jac. 2. Rot. 371. C. B.

fo. 445.
Debt on a
Penal Bill a-
gainst an Ad-
ministrator.

THE Plaintiff declares on a Bill in the penal Sum of 60 l. for the Payment of 33 l. on such a Day, and then avers, that the 60 l. were not paid, &c. per quod actio &c. Bar by several Judgments against him on Bonds made by the Intestate. Replication, that at the time of the said Judgments, there were not due on all the Bonds above 48 l. 10 s. which would be accepted in Satisfaction, and that the Defendant had Assets above the said 48 l. 10 s.. Demurrer and Joinder in Demurrer.

fo. 450.
A Replicat'
that so much
acceptari vel-
let in Satisfac-
tion of the
Judgments
pleaded by an
Admin' is ill.

The Opinion of the whole Court was, that this Replication was ill, because there is nothing alledged in the Replication, on which the Defendant was compellable to take an Issue. For the Allegation that 48 l. 10 s. *acceptari vellent*, in full Satisfaction of the Judgments, is not by him issuable; for that is a secret thing, and perhaps was not known to the Defendant, and is but Evidence of Fraud; and to take Issue that he had Assets sufficient to satisfy the said 48 l. 10 s. and also the Plaintiff's Debt, he was not compellable; because thereby it would be admitted, that so much would be accepted in Satisfaction of the Judgments, which is unreasonable. But by the Court, the true way to plead in this Case had been as in *Thompson and Hunt's Case*, 3 Lev. 368. where in the like Case as here, the Plaintiff replied, that the Creditors would accept of less Sums than their true Debts were, and offer'd so to accept them, and that the Defendant would

How the
Plaintiff in
such Case
ought to
reply.

not

not pay them, but kept the Judgments afoot by Fraud and Covin to deceive the Creditors. See also for that, 3 Lev. 311. *Knighton v. Merton*; where in the like Case it is alledged, that the Defendant had Assets sufficient to satisfy the Judgments and the Plaintiff, and not the lesser Sums only, which, as is there said, is the material Part of the Plea. Vid. Co. 8. 32. b.

But then, an Exception was taken to the Barr, viz. That it was not alledged therein that the Judgments were unsatisfied, and the greater Opinion of the Court was, that it was a good Exception. But *quære de eo*; for as a Judgment shall be intended to be had for a true Debt, so it may be reasonable to intend that it so continues to be a true Debt, till the contrary be shewn on the other side. And also there are some Precedents, wherein there is no Averment to such Purpose, viz. *Winch* 266. *Lib. Placitand.* 149. *Formulae bene Placitandi* 210, &c. *Browne*, Part 2. 89 and 92. vid. *Hardres* 75. *The Attorney General v. Buckeridge*; and note throughout the whole Case.

But then, an Exception was taken to the Declaration, viz. That it is thereby said, that the Defendant *non solvit præd' 60 l. super præd' primum diem Novembris, quas ei super eund' diem solvisse debuit, &c.* whereas it ought to have been alledged that the said 33 l. were not paid; for without that, the greater Sum in the Bill Penal did not become due, and that greater Sum is demanded by the Action. But *quære* if the Word *Sexagint'*, as this Case is, shall not be taken to be void, and as if it had not been alledged; because there is no such Sum of 60 l. by the Bill, to be paid on the said first Day of November, and then it would

Cro. C. 515.

fo. 451.

would be all one as if it had been said, that the Defendant *non solvit præd' libras quas solvisse debuit super præd' primum diem Novembris.* And for that, *vid. Blackford and Atkins's Case, Hob. 116. 3 Cro. 697. Bold and Steers's Case, Palmer 74. Halsey and Boynton's Case. Dyer 304. b. Pl. 57. Savile 71.*

Quære also, if the Plaintiff shall have Judgment in this Case, admitting his Declaration to be good, by reason of his ill Replication. And for that, *vid. the Case of Butterfield and Marshal in this Book. Curia advisare vult in the principal Case.*

Slaughter *versus* Pierpont.

Trin. 4 Jac. 2. C. B.

fo. 451.
Debt for
150 l. v. the
Def. Admin'
of the Mar-
quis of Dor-
chester.

THE Plaintiff declares, quod cum Marchio de Dorchester, *such a Day*, per Billam suam obligator' &c. cogn' se indebitat' fore cuidam Magistro Johanni Staly in 150 libr' solvend &c. cumque præd' Staly 21 Novemb' 30 C. 2. &c. was a Trader, &c. and that he was indebted, &c. in 600 l. and being so indebted, &c. on the first of November last began to keep his House, to the intent to defraud his Creditors, and thereby he became a Bankrupt the same Day. That he then being a Subject born, &c. a Commission, &c. issued, directed to, &c. whereby Authority was given them, &c. That the 10th of December, 1 Ja. 2. the Commission was renewed on the Demise of C. 2. whereby, &c. That the Commissioners, 2 Novemb' 2 Ja. 2. by Indenture, &c. inter alia assigned the said Debt to the Plaintiff, who avers, that the Debt is yet unpaid, &c. per quam quidem Indenturam, ac vigore, &c. actio accrevit. *Demurrer and Joinder in Demurrer.* These

These Exceptions were taken to this Declaration.

1. That it doth not appear thereby, that the Commissioners had done any thing in pursuance of their Commission before the Assignment by them made to the Plaintiff. And that they had not adjudged *Staly* to be a Bankrupt, *sed non allocatur*; for it shall be intended, that they have proceeded regularly till the contrary be shewn on the other side. And as to that part of the Exception, that they have not adjudged him to be a Bankrupt, it is not of necessity to alledge it; for if it had been alledg'd, it was not traversable. But it is averr'd in Fact that he became a Bankrupt such a Day, &c. and that is only traversable by the Defendant.

fo. 455.
That the Commissioners declar'd the Person, &c. a Bankrupt, is not traversable.

2. That it doth not appear, that the Bankrupt at the time of the second Commission was indebted in 100 l. *sed non allocatur*; for that is not requir'd by any Statute of Bankruptcy; but that which giveth countenance to this Exception is the Stat. 21 *Ja.* 1. whereby it is enacted, *that if any Person being indebted 100 l. or more, shall not pay it, or make Composition for it within six Months after the Debt shall become due, &c. shall be adjudged a Bankrupt.* So that that is merely another Description of a Bankrupt than those which are mention'd in the former Statutes. And I know that this Exception on this Reason was over-ruled by the Chief Justice *Treby*, on a Tryal of a Cause before him at *Guildhall*, at the Setting after *Mich.* Term, 1698. in a Cause between *Smith* and *Sir Richard Blackham*, in which I was of Council with the Plaintiff.

fo. 456.
A Man may be a Bankrupt tho' he doth not owe 100 l.

3. That it is not alledg'd in the Declaration, that the former Creditors were not satisfied.

What shall come in on the other side.

A Commission may be granted on the Petition of one who is not a Creditor.

Notice need not be given of an Assignment by the Commissioners of Bankruptcy.

tified before the last Commission, and it might reasonably be presum'd that they were satisfied, for there were Seven Years between the first and the second Commission: *Sed non allocatur*; for it shall not be so intended; and if they were satisfied, it ought to come in on the other side: And also it appears that the Debt due to the Plaintiff was on Bond made a long time before the first Commission, and it is not necessary that there should be divers Creditors, or that the Petition to have a Commission should be by any Creditor, and so it was ruled at the Trial aforesaid, for the Words of the Statute 13 *El. cap. 7.* are, *That the Lord Chancellor, &c. on any Complaint made to him in Writing against a Bankrupt, &c.* But no Act requires that such Complaint shall be made by any Creditor.

4. That it was not alledg'd, that Notice was given to the Defendant that the Debt in question was assigned to the Plaintiff by the Commissioners, which the Defendant's Council strenuously insisted ought to have been done, because if he had Notice that he was to pay the Money to the Plaintiff, he might come in and confess the Action; and thereby he had saved Costs, and also had prevented any Amercement on him, and for that the Case of *Hennesty* 2 *Cro.* 422. and the Case of *Saunders and Lawrence*, *Allen's Rep.* 24. were cited, and thereupon *Curia advisare vult*; and after Consideration had thereof, the Court resolved that Notice was not necessary: and a main Reason which induced the Court to be of that Opinion, was a Clause in the Act of 1 *Jac. 1. cap. 15. par. 13.* whereby it is enacted, *That the Assignment of the Commissioners shall vest the Property, Right and Interest of the*

Debt

Debts assigned in the Person of the Assignee, as fully to all Intents and Purposes as if the Bonds, &c. had been made to the Person of the Assignee. After several Arguments the Plaintiff had Judgment by the Opinion of the whole Court. Holt, the King's Serjeant, was of Council with the Plaintiff; Pemberton and Levinz with the Defendant.

fo. 457.

Note, There is no Number-Roll of this Case in the Prothonotary Cooke's Book. But it appears by that Book that Judgment was given for the Plaintiff, Mich. 4 Ja. 2.

Darby *versus* Piltarfe.

In a Writt of Error on a Judgment given for Piltarfe in B. R. Mich. 1 Ja. 2. Rot. 423.

THE Plaintiff declared on a Writing dated the 26th of October, 35 C. 2. whereby it was recited, that the Plaintiff had for several Years transacted and dispatched several Affairs for the Defendant; in consideration whereof, the Defendant obliged himself to pay the Plaintiff and his Wife 100 l. per Ann. quarterly for seven Years, if either of them should so long live, the first Payment to be on the 25th of March then next: And averr'd, that on the 25th of December last past, the Plaintiff and his Wife were alive, &c. and that 100 l. for four quarterly Payments were then in arrears. Judgment for the Plaintiff by Non sum informatus.

fo. 457.

This Judgment was after revers'd in Camera *quacarr'* because it appears by Computation, that six quarterly Payments were due when he demanded 100 l. and it is not shewn for which quarterly Payments he demands the

fo. 459.
If the Plaintiff demands 4 Payments where 6 are due, he must shew which.

faid four quarterly Payments : And it is not
Show. 8. s.c. sufficient to say that they were due the 25th
 of *December* before the Action brought, for
 that is true if they were due before.

Death *versus* Dennis.

Pasch. 3 Ja. 2. Rot. 358. C. B.

fo. 459.
 Debt for
 100 l.

DE BT on Bond for Performance of Articles on
 the Marriage of A. with the Defendant,
 whereby 'twas agreed (inter alia) that the Defen-
 dant should have the Rents of the Lands of A. after
 the Marriage, during their joint Lives, except the
 Rents which should be due at Michaelmas then
 next ; and the Defendant covenanted with the
 Plaintiff and another Person now dead, to pay an-
 nually at Lady-Day and Michaelmas, 20 l. to
 the Use of A. Bar, by Performance generally. Re-
 plication, that the Marriage was had such a Day
 and the Defendant had not paid 10 l. at such a
 Feast. Averment, that A. was alive, &c. De-
 murrer and Joinder in Demurrer.

fo. 463.

In this Case there was but one Exception
 taken by the Defendant's Council, viz. that
 the 20 l. were not to be paid but for the first
 Year after the Marriage ; but the Opinion
 of the Court was, that the Payment was to
 continue during the joint Lives of the Defen-
 dant and the said Anne, by the Intent of the
 Articles ; for by the exprefs Words thereof
 the Defendant was to have all the Profits of
 the Land, from the time of the Marriage
 except the Rents and Profits which should
 accrue at the Feast of St. Michael next follow-
 ing. And in Consideration of the Premises
 the Defendant covenanted to pay the said

20 l. yearly, the first Payment to commence at the Feast of the *Annunciation* next ensuing; whereby it appear'd that it was the Intent of the Parties, that as the Defendant was to have the Profits of the Land during their joint Lives, that so it was their Intent that he should pay the 20 l. during their joint Lives, in lieu of the said Profits; for the Woman till *Michaelmas* was to have the Rents and Profits themselves, but after *Michaelmas* but 20 l. *per Ann'* And Judgment was given for the Plaintiff.

Geang *versus* Swaine.

Mich. 3 Jac. 2. Rot. 174. C. B.

DE B T for 25 l. on a Bond dated 15 Dec. 36 C. 2. the Defendant craves Oyer of the Condition; which was as followeth, viz. The Condition of this Obligation is such, that whereas the above-bounden Charles Turner, John Turner, and Thomas Swaine, have received at, or before the enfealing and delivery of these Presents of the above-named Henry Geang, the Sum of 12 l. 10 s. of lawful Money of England; and in consideration thereof, and likewise in respect of the Age and Infirmary of the Body of the said H. Geang, have agreed, and are content to pay to him the said Henry Geang the Sum of 12 l. 10 s. on the 15th Day of January next, being one Month after the Date of the above-recited Obligation, and in default thereof, the Sum of 14 l. 7 s. 6 d. of lawful Money of England, on the 15th Day of June next ensuing the Date hereof, being six Months after the Date of the said above-recited Obligation, if the said Henry shall so long live; but if the said Hen-

fo. 464.
Debt on
Bond with a
subtile Con-
dition to a-
void the Stat'
of Usury.

ry Geang shall happen to die before the said 15th Day of June next ensuing the Date hereof, then it is agreed that the abovesaid Charles Turner, John Turner, and Thomas Swaine, shall keep and retain to themselves the said Sum of 12 l. 10 s. and also the Interest thereof, and then and in such Case the said Henry Geang shall lose both his Principal and his Interest. If therefore the said Charles Turner, John Turner, and Thomas Swaine, or any of them, their, or any of their Executors, Administrators or Assigns, shall well and truly pay, or cause to be paid, unto the abovesaid Henry Geang, or his Assigns, the said Sum of 12 l. 10 s. of lawful Money of England, without Interest, on the 15th of January next aforesaid, or in default thereof, the aforesaid Sum of 14 l. 7 s. 6 d. of lawful Money of England on the before-mentioned 15th Day of June next ensuing the Date of these Presents, if the said Henry Geang shall be then living, or if the said Henry Geang shall happen to die before the said 15th Day of June next ensuing, then this Obligation to be void: But if the said Henry Geang shall live until the said 15th Day of June next, being the time of Payment aforesaid, and the said 14 l. 7 s. 6 d. shall be then unpaid contrary to the Tenor of these Presents, then this Obligation to be of full Force and Virtue. And then pleads, that he after the 15 Day of June in the Condition, &c. had paid to the Plaintiff 8 l. 17 s. 6 d. and that he and one T. S. had seal'd, &c. to the Plaintiff another Bond of the Penalty of 20 l. with Condition to pay 10 l. &c. and that the Plaintiff had accepted it accordingly. Demurrer and Joinder in Demurrer.

fo. 466.

It was resolved that the Plea was ill, because admitting that a new Bond may be given in Satisfaction of Money due on another Bond, yet here it appears that the first Bond

was

was forfeited, and the whole Penalty was due in Law, and then Acceptance of Security for a less Sum, which is the Case here, can't be any Satisfaction of the greater Sum. *Co. 5. 117. Pinnel's Case.* But then it was insisted, that it appears by the Condition that the Bond was usurious. But to that it was answer'd and resolv'd, that the Statute ought to have been pleaded, for if it was *prima facie* Usury on the View of the Condition, yet peradventure the Plaintiff might have rectified it by his Replication, as in *Buckley and Guildbank's Case*, 2 *Cro.* 677.

Altho' a Bond appears to be Usurious, yet no Advantage can be taken unless the Statute be pleaded.

Two of the Judges were of Opinion that the Bond was not Usurious, the others did not speak to that Point. As to the first Point *vide* these Books, *Cro. C.* 19. *Farmer and English's Case*, and *60. *Lovelace and Cocket's Case*, and 192. *Simms and Mewdsforth's Case. Co. 9. 79. Peyto's Case. Co. Lit. 212. b. Co. 6. 44. b. Hob. 68. 1 Mod. Rep. 225. Mo. 573. Nu. 667, 787. Penny and Core's Case*, where it is held by the Court, that in Debt on Bond with Condition to pay 8*l.* it is a good Plea that the Defendant, before the Day, had paid the Plaintiff 5*l.* &c. in Satisfaction of the 8*l.* see also 3 *Lev.* 55. *Lobly and Gildart's Case*, and *Girle and Field's Case* here in this Book. Judgment for the Plaintiff in the principal Case.

M 4

Mason

Q. If it shou'd not be 85, 86; for so it is in my Edition printed in 1657.

Mason *versus* Fulwood.

Trin. 4 Ja. 2. Rot. 382. C. B.

fo. 467.
Debt on
Bond with a
subtile Con-
dition to a-
void the Stat'
of Usury.

ACTION of Debt for 60 l. on Bond dated 30 Aug. 2 Ja. 2. made by one John Collett and the Defendant as his Security, the Defendant craves Oyer of the Condition, which is as followeth, viz. That whereas the above-named John Mason at the Request of the above-bound John Collett, having lent and paid unto him the Principal Sum of 30 l. Sterling upon Adventure of the natural Life of him the said John Collett: If therefore the said John Collett or his Assignes at the End of Twelve Months Calendar, or any sooner time, from and after the first Three Months commencing from the Day of the Date hereof, do and shall well and truly pay or cause to be paid unto the said John Mason, his Executors, Administrators or Assigns, the Sum of 32 l. 5 s. Sterling Money, and after and according to the rate of 6 d. each Pound each Month for all such time whatsoever as shall be expired and spent at such assigned time of Payment, from and after the first three Months commencing as aforesaid, or if within the said twelve Months, and before such Payment of every Principal and Præmium, the said John Collett shall happen to depart this natural Life, that then this present Obligation shall be void and of none Effect, or else to be and remain in full force and Virtue. And then pleads a special usurious Agreement, consisting of several Circumstances, by which the Bond is void by Stat. 12 C. 2. Demurrer and Joinder in Demurrer.

fo. 469.

This Case was argued by Baldock for the Plaintiff, and Pemberton for the Defendant.

That

That the Contract was not usurious, these Cases were cited, 2 *Rolls Rep.* 47, & 48. *Mo.* 752. *Ellis and Ward's Case.*

That it was usurious, these Cases were cited, viz. *Burton's Case*, *Co.* 5. 69, 70. *Clayton's Case*, 2 *Cro. Roberts and Tremain's Case*, 3 *Cro.* 642. and *Mo.* 398. *Button and Downham's Case.* The Record of which Case I have seen enter'd *Trin.* 40 *El. Rot.* 865. By which Record it appears, that as well the Principal as the Interest was in Danger; tho' it doth not appear so fully by those Books.

fo. 470.

I believe this Action was not prosecuted any further, for I never heard any thing of it after this Argument, and no Judgment is enter'd on the Roll, and by the Prothonotary's Books *nil ultra* appears.

Ball *versus* Richards.

Hil. 3 & 4 *Ja.* 2. *Rot.* 491. *C. B.*

DEBT on Bond with Condition to save the Plaintiff harmless from another Bond, in which the Plaintiff was bound for the Defendant as Collector of the Revenues of the New-River-Company. Bar, that the Plaintiff was not damnified. Replication, that the Defendant had receiv'd 1300 l. &c. and had not paid it according to the Condition; whereby he was threaten'd to be Arrested, and to prevent it had paid 250 l. &c. Demurrer.

fo. 470.
Debt on
Bond.

One Exception was taken by Holt the King's Serjeant, to the Replication.

fo. 472.

That there was not any sufficient Breach assigned of the Condition of the first Bond, in which the Plaintiff is bound with the Defendant.

fo. 473.

fendant. The Condition (*inter alia*) is, that he shou'd pay all Sums which he shou'd receive for Rent, or otherwise, due to the Governor, &c. to the Treasurer of the said Company, within one Month after receipt; and in the Replication it is alledged, That after the making of the said Bond, and before the Original, the Defendant had collected and received 1300 l. for Rent, belonging to the Governor, &c. and that he *bucusque* had not paid it to the Treasurer of the said Company. But thereby it doth not appear that the Defendant had received that Money, or any part thereof, by the space of one Month before the purchase of the Original, and by consequence, for any thing that appears in the Case, the Action was brought before Cause of Action. To that it was answer'd by *Levinz* of Council with the Plaintiff, that it was said that the Defendant had not *bucusque* paid the 1300 l. *secundum formam & effectum Conditionis*, which was a sufficient Allegation that he had received the said Money by the space of a Month and more before the Original, and that he had not paid it within that time, especially the Demurrer being general, without shewing of that Matter for Cause of Demurrer, and the Plaintiff might well take Issue thereupon. He also said, that it appear'd that the Money was unpaid 21 April, 3 Jac. and it is alledg'd that it is not paid *bucusque*, and the Action is of *Hill. 3 & 4 Jac. 2.* So that it must necessarily follow that the Money was received by the space of a Month before the Action; and that it was not yet paid. But the whole Court was of Opinion that the Exception was good, notwithstanding those two Answers
to

to it. And as to the first Answer they said, that the Plaintiff ought to have alledg'd that the Defendant by the space of a Month and more before the Purchase of the Original, *scil'* such a Day, &c. had received, &c. and had not paid it, &c. or that the Original was purchased such a Day, and that the Defendant had received 1300 *l.* a Month and more before the said Day, and had not paid it within a Month after Receipt, and that the Condition being so special the general Allegation *quod non solvit præd'* 1300 *l.* according to the Form and Effect, &c. was not sufficient. And for that, *vid.* 1 *Lev.* 145. *Brooks v. Dean.* 3 *Lev.* 293. *Watnough v. Holgate.* *Dier* 243. b. pl. 56, 57. 2 *Saund.* 185. *Roberts v. Marriot.* *Winch Entr.* 302, 303. But yet, *vid.* *Lamplugh and Shiers Case,* *antea* p. 351. and 3 *Cro.* * 381. *Fox v. Lee.*

And as to the other Answer, it was said by the Court, that it was no Answer to the Objection; because it might be true that the 1300 *l.* were not paid *hucusque*, and yet that the Plaintiff had no Cause of Action at the time of the purchase of the Original; for if they were not received by the space of one Month before the Original, the Action was brought before Cause of Action. And also if that Answer would have related to the time of the Receipt of the 1300 *l.* yet that is but Matter argumentative, and it may be true that the Original in the Action was purchas'd a long time before the Term in which the Cause is; for the Action may be continued for several times by a *Vic' non misit breve.* And Judgment was pronounced for the Defendant; but after, the Plaintiff had liberty to amend his Replication.

Nichols

Q. If it should not be 281. pl. 1.

Nichols *versus* Tymms.

Trin. 3 Jac. 2. Rot. 723. C. B.

fo. 478.
Debt for
Rent by the
Assignee of
the Reversion
in Fee against the Assignee of the Term for Years.

THE Plaintiff declares, that one P. M. 16 Apr. 4 C. 1. was seised in Fee of a Messuage, &c. in A. and that he the same Day, &c. demised it to one T. W. to hold for 99 Years, if he and T. B. Son of T. B. &c. and A. the Wife of T. B. the Son, so long should live, at the yearly Rent of 20 s. That the Lessor, 1 Apr. 20 C. 2. died seised of the Reversion, which descended to R. M. his Grandson and Heir, &c. That the said R. M. 13 Octobr' 28 C. 2. by Indenture for a certain Sum of Money, bargain'd and sold the said Reversion to the Plaintiff, habend' from the Day before the Date, &c. for a Year, and 14 Octobr' 28 C. 2. granted him the Reversion in Fee. That the Residue of the Term came to the Defendant by mean Assignment, &c. by virtue whereof the Defendant entred, and was possessed, &c. until and after the Feast of St. Michael, ac Tenementa, &c. occupavit ad novem libras de &c. per quod &c. And then avers that T. B. the Son was alive after the said Feast. Demurrer and Joinder in Demurrer.

fo. 481.
If an Assignee brings Debt for Rent he ought to be nam'd Assignee in the Writ.

The Plaintiff had Judgment of course, because the Defendant did not appear to argue his Demurrer. But note, that the Plaintiff's Title to the Rent is as Assignee of the Reversion; and in that Case he ought to be so named in the Writ, and so are all the Precedents.

And also it is not sensibly alledged, that 9 l. Rent for 9 Years were due to the Plaintiff; for it is said in the Declaration, that the Defendant occupavit Tenementa præd' ad novem

*novem libras, in lieu of novem libræ fuer' are-
tro, &c.*

Robert Crotch *versus* El. Crotch, *Executrix*
of Edward Crotch.

Trin. 3 Ja. 2. Rot. 310. C. B.

DEBT on Bond to pay 5 l. to the Plaintiff for the
Use of his Daughter, at a time limited in certain
Indentures. The Defendant pleads, that the Indenture
was made between the Plaintiff of the one part, and
the Defendant's Testator and one H. T. of the other
part; by which Indenture the Plaintiff enfeoffed
H. T. &c. to the Use of the Testator and his Heirs.
And the Testator thereby covenanted to pay 5 l. to
the Plaintiff, &c. within two Months after the
Death of J. B. which J. B. is alive; and avers,
that the 5 l. in the Condition and in the Indenture
are the same. The Plaintiff demurs, for that the
Defendant hath not produced the Indenture.

fo. 481.
Debt on
Bond.

Holt the King's Serjeant strenuously insist-
ed, that the Indenture ought to have been
shewn: For he said, that if the Bond had
been for Performance of Covenants, without
doubt it had been so, and here it is for the
Performance of a Covenant, and in Effect
there is no Diversity; and that the Deed is
the Defendant's Excuse, and in her Relief,
and the Court ought to judge on the Deed
it self; otherwise the Defendant might ima-
gine a Deed, and on that Surmise the Cause
shall depend; for if it is not produced, no
Oyer can be had thereof: And if the Testator
had been alive, he ought to have produced
it, and the Defendant, who personates and
represents him, ought likewise to do so. And he
put

fo. 483.

the Case in *Littleton*, that if two do a Trespass, and a Release is made to one of them, and an Action of Trespass is brought against the other, he may plead that Release; but then, altho' he is a Stranger, he ought to have it in hand, 10 Rep. Dr. *Leyfield's Case*. But the Court was of a contrary Opinion, because the Defendant was a Stranger to the Deed, and it doth not belong to her, but to the Feoffees, and she hath no means to enforce them to produce it; and therefore the Court would not impose an Impossibility on the Defendant, especially being an Executrix. And these Cases were cited to that purpose, viz. 1 Cro. 441. *Stockman and Hampton's Case*. 2 Cro. 70. *Dagge and Kent's Case*. *Dyer* 277. Pl. 58. and 217. *Countess of Huntington's Case*. But the Plaintiff had leave to discontinue.

Pope *versus* St. Leger.

Mich. 5 W. & M. Rot. 337. C. B.

fo. 484.
Debt for 107 l. 10 s.
the Value of 100 Guineas.
S. C. is in *Salk. 344. and 4 Mod. 406.*

THE Plaintiff brought an Action of Debt for 107 l. 10 s. and declared for the value of 100 Guineas, on a Wager concerning the playing a Cast at Back-Gammon, which was stated in Writing, &c. and was to be determined by the Groom-Porter, and produced the Deed on which the Action is founded, and aver'd that the Groom-Porter gave Judgment for him. The Defendant craved Oyer of the Deed, and pleaded the Statute of 16 C. 2. cap. 7. against Excessive Gaming. Demurrer and Joinder in Demurrer.

fo. 487.
On the Argument of this Case, these Points were debated.

1. That

1. That this Case was within the Statute of 16 C. 2. *cap.* 7.

But the Opinion of the Court was clearly, that it was not within the Statute, because it was a meer collateral Matter, and which happened on meer Chance, and the Event thereof did not depend on the Success of the Game; and also the Act expressly prohibits Wagers on the Parts or Hands of the Players, and if they had intended any other Wagers, it is probable that mention would have been made thereof.

A Wager on the Method of playing a Game is not within the Stat' of 16 C. 2. *cap.* 7.

2. Then an Objection was made to the Declaration, *viz.* that no Place was alledg'd where the Groom-Porter gave his Judgment.

But to that it was answered by the Plaintiff's Council, that there was a Place alledg'd; for it is said, that the Groom-Porter *adjudicavit quodque præd' 100 Guineas fuer' valoris &c. apud Paroch' S. Martini præd'* But if the Place had been omitted, yet the Declaration was good notwithstanding that Exception, because the Defendant had confessed the Fact, and then that Fault is cured thereby, according to Sir Richard Grobham's Case, *Hob.* 82. *Gurnon* and *Hardye's* Case. *Yelv.* 11. 2 *Cro.* 682. *Buckland's* Case. And thereupon that Exception was disallowed by the Court.

Where the want of a Venue is aided.

3. It was objected, that it did not appear by the Declaration that the Groom-Porter had given any Judgment on the Case, because it is not alledg'd that the Case stated was tender'd to the Groom-Porter, or that he had given his Judgment thereon.

fo. 488.

To which it was answered by the Plaintiff's Council, that by the Declaration it appear'd that there was a Wager laid between the

the

put the Parties, and what it was; and then it is also alledged, that the Groom-Porter *adjudicavit in casu præd'*; and it also appears by his Judgment, that the Matter in Controversy on that Wager was determined by him for the Plaintiff, which was sufficient. And after the Plaintiff had Judgment by the Consent of the whole Court. *Levinz* and *Birch* were of Council with the Defendant, *Pemberton* and *Lutwyche* with the Plaintiff.

But a Writ of Error was brought thereon, and on that it was insisted by the Council of the Plaintiff in the Writ of Error,

1. That Debt in the *Debet & Detinet* (as this Case is) doth not lie for the 107 *l.* 10 *s.* for the Court can't take notice that Guineas are above the value of 20 *s.* altho' by way of Commerce and mutual Compact they pass for 1 *l.* 1 *s.* 6 *d.* But such Compact can't enhance the Value of the Coin, and therefore that the Demand ought to be only of 100 *l.* or of 100 Guineas, with an Averment of the Value of them. They agreed the Cases of Foreign Coins, and that Debt lay for 60 *l.* *Monetæ Flandriæ*, which amounted to so much English, as 2 Cro. 88. *Yelv.* 80. *Draper* and *Rastall's* Case. 1 Leon. 41. But *Latch.* 84. is, that for English Money a Declaration can't be *ad valenc'*. He also agreed, that in *Fencot* and *Burrough's* Case, *Trin.* 5 *W. & M. B. R.* where the Action was an Action on the Case on a Bill of Exchange for 55 Guineas, the Court adjudged for the Plaintiff, because the Jury may assess Damages according to the Rate then Current: But otherwise it was in Debt, where the Plaintiff shall recover according to his Demand.

But to that it was answer'd by the Defendant's Council in Error, that when one demands Foreign Coin in Specie, the Writ may be in the *Detinet* only; but when the Value thereof in *English* Mony is demanded, it may be in the *Debet & Detinet*. And to that the Chief Justice and *Eyre* Justice seemed to agree, and by *Eyre* Justice Guineas are as Foreign Coin.

Debt in the *Debet & Detinet* lies for the Value of 100 Guineas, viz. 107 l. 10 s.

2. It was moved that this Case was within the Statute; but I do not find that the Council insisted much upon that.

3. It was objected, that it was not averr'd that the 100 Guineas were not paid in Specie, and for that *Rast. 158. Yelv. 135. Popham 28. 1 Cro. 515.* were cited.

The Chief Justice said that the Declaration was ill, for the Plaintiff ought to have declared on the Deed and on the Case also, and then shewn that the Case was brought to the Groom-Porter, and that he had given his Judgment thereupon. But here, the Plaintiff hath taken upon him to aver the Purport of the Case without producing it, which is not to be suffer'd. And altho' the Declaration, by way of Recital, hath shewn the Substance of the Case, yet when it is in Writing, the Writing it self ought to be produced. As if *A.* and *B.* agree by Writing concerning the Purchase of Lands in *F.* and then *A.* covenants with *B.* to assign to him the Lands in the said Writing contained; if *B.* would bring an Action for Breach of that Covenant, he can't shew that *A.* covenanted to assign the Lands in *F.* but the Lands in the Writing, and shew it, and that the Lands in the Writing and in the Declaration are the same Lands without any Variance. And he inclined to reverse the Judgment for that

fo. 489.

Cause, and also because the Plaintiff had not shewn that the Guineas were not paid in Specie. *Sed adjournat'* But in *Trin. Term*, 7 *W. 3.* the Chief Justice and Eyre Justice being present, the Judgment was reversed. And the Chief Justice gave the Reason, because the Plaintiff had not shewn the Case, and Play and Wager, and then the Deed by which the Parties had bound themselves in *pignratione præd'* and on Oyer of the Deed it appears, that it was to stand to the Judgment of the Groom-Porter on a Case stated and sign'd by us both, which is not the same. And because the Writing containing the Case ought to have been shewn, and an Averment taken that the Case therein and in the Declaration were all one, and altho' it was urged that the Inducement of the Case and that stated are all one; and therefore whether the Averment was before the Deed, or after it, was not material, yet the Chief Justice was of another Opinion, because the Declaration supposes the Deed to be to perform a Wager contain'd in the Deed, whereas it is to perform a Case extrinical, and which is to be coupled by Averment.

And for that Reason the Judgment was reversed, as I have been credibly inform'd.

Elwick versus Cudworth.

Passb. 5 W. & M. C. B.

fo. 490.
Debt for
2200 l. on an
Indenture.

DEBT on an Indenture, whereby the Plaintiff covenanted with the Defendant to assign to him, or to any other whom he should appoint, on the 30 Jan. next following, 10 Shares in the Corpora-

tion of the Linnen Manufacture, and the Defendant covenanted with the Plaintiff to accept them the said 30 Jan. and at the same time to pay the Plaintiff 1100 l. Breach for Non-payment of the said 1100 l. on the said 30 Jan. Bar that the Defendant on or before the said 30 Jan. had not appointed any Person to whom the Plaintiff should assign, and that the Plaintiff on the said Day had not assign'd, &c. to the Defendant himself. Replic' that the Plaintiff on the said Day had assign'd to the Defendant himself, but no place is alledg'd where, &c. Demurrer.

One Objection was made by the Defendant's Council, that no Place was alledg'd in the Replication where the Plaintiff had assigned to the Defendant the said ten Shares.

fo. 492.

But to that the Plaintiff's Council answered that it was not necessary, because the Covenants were reciprocal, and the Performance of the one doth not depend on the Performance of the other.

To which the Defendant's Council replied, that the Assignment ought to precede the Payment of the Money, because the Covenant for the Payment of the 1100 l. was in Nature of a Condition or Defeazance to save the Forfeiture of the 2200 l. And therefore the Condition shall be taken more favourably for the Obligor. So that if the Matter of the Condition may have two Intendments, the better for the Obligor shall be taken; and for that *Dier 17. a.* was cited, which is an apt Case for this Purpose; and therefore see the Case and Note; for by the Rule of that Case, and also by the Resolution of the Court thereupon, the Payment of the Money in the now Case ought to refer to the

7 Co. 10. 6.
Cro. El. 888.
Pl. 2. Cro. Ja.
623. Pl. 15. 1.
Ven. 147, 177,
214. Salk. 112.
13, 171. Antea
pag. 89.

fo. 493.

Acceptance of the Assignment, and not to the Day in which the Assignment ought to be made; and if it be so, then it was impossible that the Defendant should accept the Assignment before it was made. So that the true Sense and Meaning of the Deed was, that the Plaintiff should assign and transfer the Shares on the 30 Jan. and that the Defendant should accept it, whereby on such Acceptance the Money should be paid. And so was the Opinion of the whole Court; and thereupon the Plaintiff prayed Leave to discontinue, and had it. *Lutwyche* was of Council with the Defendant.

Nota, The Replication was to no purpose, because no Place is alledg'd where the Plaintiff had assign'd, &c.

Hilton *versus* Smith.

Hill. 2 W. & M. Rot. 739. C. B. 1

fo. 493.
Debt for
315 l. on a
Deed almost
insensible.

THE Plaintiff declares, that the Defendant the 14th of March, 1687. per quoddam Scriptum &c. covenanted to pay him 315 l. The Defendant craves Oyer of the Deed, which was in these Words. Memorandum the 14th Day of March 1687. Imprimis, It is covenanted, conditioned, concluded, articulated and agreed upon, by and betwixt Thomas Hilton, Esq; of Beethome in the County of Westmorland, of the one part, and John Smith of Priesthutton in Lancaster, Gent. of the other part. Whereas Mr. Thomas Hilton by virtue of these Presents hath covenanted, concluded and articulated all that his Messuages and Tenements situate, lying and being in Yealland, and within the decreed Custom of the aforesaid Yealland, with all

and every of their Appurtenances, unto the within-
 named John Smith, and to his Heirs and Assigns
 for ever. Item, for the Sum of 315 l. of good and
 lawful Money of England, the one half to be paid
 (that is, the Sum of 157 l. 10 s.) in and upon the
 2d Day of February, which is to come, and will be
 in the Year of our Lord 1688. Item, The said
 John Smith to enter the 2d Day of February
 abovesaid. Item, The said John Smith, or his
 Assigns, is to pay the other half (that is to say, the
 Sum of 157 l. 10 s. of like lawful Money of Eng-
 land) in and upon the 2d Day of February, which
 is to come, and will be in the Year of our Lord 1689.
 Item, The abovesaid Mr. Thomas Hilton doth
 bind himself by the virtue hereof, in the Forfeiture
 of 40 l. of lawful Money of England for Non-
 performance of the abovesaid Articles, at and with-
 in the space of one Month after the 2d Day of Fe-
 bruary 1688. unto the said John Smith or Assigns.
 Item, The abovesaid John Smith, Gent. doth bind
 himself and his Assigns by virtue hereof, in the For-
 feiture of 40 l. of lawful Money of England, for
 Nonperformance of the abovesaid Articles, at and
 within the space of one Month after the 2d Day of
 February 1688 unto the abovesaid Mr. Hilton
 or his Assigns. In Witness whereof, the Parties a-
 bovesaid have interchangeably set their Hands and
 Seals the Day and Year abovewritten. Memorandum,
 before the Sealing and Delivery hereof,
 Mr. Thomas Hilton is to receive the Year's Rent
 of the Tenements of Yealland for the Year 1687. and
 also for the Year 1688. And also the said
 Mr. Thomas Hilton having good Security for the
 Remainder of the Money. Quo lecto & audito
 dem Johannes dicit, that the Plaintiff had not
 made any good Assurance, &c. to him, nor had per-
 mitted him to enter, &c. Demurrer and Joinder
 Demurrer.

fo. 495.

It was objected in this Case, that the Words of the Deed would not make a Covenant on the Plaintiff's part to convey the Land to the Defendant, because the Words of the Deed are in the *Præter Tense*, viz. *Mr. Thomas Hilton hath covenanted, &c.* And by Consequence the Defendant hath not any Remedy, if the Plaintiff doth not perform his Part.

Where
Words in the
Præter Tense
will amount
to a Covenant
in *Præsent*.

Resp. But to that it was answered by the Plaintiff's Council, that the Words in the *Præter Tense*, *ut res valeat*, may be construed as if they were in the *Present Tense*; and to prove that, *Bedow's Case*, 1 *Leon.* 25. was cited, and *Mo.* 31. And the rather in this Case, because the Deed is, *Imprimis, it is covenanted, concluded, &c.* and also because the Words in another Place are, that the Plaintiff *hath covenanted, &c. by these Presents.*

2. *Obj.* That there are no Words in the Deed to oblige the Plaintiff to convey the Land to the Defendant, the Words of the Deed to that purpose being only, that *Mr. Thomas Hilton by virtue of these Presents hath covenanted, concluded, and articulated all that his Messuages, &c. to the within-named John Smith &c.*

fo. 496:

Resp. To which it was answered, that it is apparent by the Contexture of the Deed that it was the Intent of the Parties, that the Defendant should have the Lands to him and his Heirs. 1. Because he was to pay the Value of them. 2. Because by the express Words of the Deed he was to enter therein the 2d of *Feb.* 1688. and he could not have them without Conveyance; and that the Words of the Deed would amount to a Co-
venant

venant, &c. the Case of *Pordage and Cole*,
1 Saund. 319. was cited.

3. *Obj.* Another Objection was, that the Word *Whereas* in the first part of the Deed, had made the whole Deed but a Recital.

Resp. To which it was answered by the Plaintiff's Council, that the Words in the Deed, *viz.* *By these Presents*, would not admit of such an Objection; for those Words shew that he covenanted by the Deed, and then the Word *Whereas* is an idle, insignificant Word, and wholly to be rejected as if it had not been in the Deed; and for that the Case of *Crowley, Vaughan* 173. was cited, and there are many other Cases to that purpose. And for the same Reason the Word *Item*, in the Clause for Payment of the Money, shall be rejected also. And if the Words *Whereas* and *Item* shall be rejected, and the Words *both covenanted* shall be taken as in the *Present Tense*, as they may, as appears before; then the Sense will be as followeth, *viz.* *Mr. Thomas Hilton doth covenant to convey all his Messuages, &c.*

4. *Obj.* Another Objection was made, that the Plaintiff was to convey the Lands before the Payment of the Money.

Resp. To which it was answered, That that can't be, because it is adjudged in *Pordage and Cole's* Case before cited (which is a like Case) that the Word *pro* doth not make a Condition precedent: And if it should be so, it is to no purpose for the Defendant in this Case; for then the Payment of the Money is a Condition of the Part of the Defendant, for he is to pay the Money *pro* the Lands. But the true Effect of the Deed in Law is, that the several Agreements are re-

What Covenants are Reciprocal, and what not.

ciprocal Covenants. And to prove that, these Cases were cited, 3 Leon. 219. Brocas's Case. Rolls Abr. 1 Par. 414. Lett. T. Nu. 5. 416. Nu. 15. Bragg and Nightingale's Case. Judgment for the Plaintiff by the Opinion of the whole Court. Lutwyche of Council for the Plaintiff.

Wethersby & Bence *versus* Benefice.

Hill. 4 & 5 W. & M. Rot. 1421. C. B.

fo. 497.
Debt on
Bond.

DE B T on a Bond of 40 l. made to the Plaintiffs Bayliffs of the Burrough of D. with Condition to appear at the next Sessions of the Peace for the said Burrough of D. &c. Bar that he was imprisoned by the Plaintiffs and others de covina sua till he made the Bond. Replication that the Defendant was indicted at such a Quarter-Sessions for several Trespasses and Misdemeanors, and among others for brewing ten Barrels of Strong Beer and selling them without giving notice to the Officer of Excise, and that he was taken by a Capias, &c. and thereupon he enter'd into the said Bond, which was made for his Appearance at the next Sessions, &c. Et non per Covinam præd' Et hoc petunt &c. Demurrer and Joinder in Demurrer.

fo. 501.

One Objection only was taken in this Case by the Defendant's Council, viz. that the Plaintiffs, as this Case is, have not any Authority to take a Bond in their own Names with such Condition. But they ought to have taken a Recognizance in the Names of the King and Queen; *sed non allocatur*. And the Plaintiffs had Judgment. Lutwyche of Council with the Plaintiffs.

Girle *versus* Field.

Mich. 3 W. & M. C. B.

DEBT on a Bond of 100 l. with Condition to pay 5 l. 10 s. on such a Day. Bar that the Plaintiff after the Day in the Condition had accepted of another Bond in discharge of the Sum in the Condition. Demurrer and Joinder in Demurrer.

fo. 501.
Debt on
Bond.

Judgment was given for the Plaintiff by the Opinion of the whole Court, altho' no Exception was taken to the Plea, that it was not said therein that the second Bond was given in Satisfaction, &c. but only that the Plaintiff had accepted it in Satisfaction and Discharge, &c. Lutwyche was of Council with the Plaintiff.

fo. 502.

Rooke *versus* Clealand.

Trin. 6 W. & M. Ret. 1508. C. B.

DEBT on Bond by an Administrator against Hester Clealand, Aunt and Heir of Eliz. Clealand, Daughter and Heir of Benj. Clealand the Obligor. Bar by riens per discent. Special Verdict, That Ann Head was seised in Fee of Lands, &c. and took to Husband Tho. Clealand; that Ann is dead, and Tho. is Tenant by the Curtesy; that the Reversion descended to Benj. the Son of Ann, who died seised, and the Reversion descended to Eliz. his Daughter and Heir, and from her to the Defendant. Et si, &c.

fo. 503.
Debt by an
Administra-
tor against
the Defen-
dant as Aunt
and Heir of
E. C. Daugh-
ter and Heir
of B. C.

The

fo. 507.

The Pedigree in this Case.

Ann Head seised of | *Thomas Clealand* Tenant by
the Lands. | the Curtesy and alive.

— — — — —
Benjamin
the Obligor.

— — — — —
Hester
the Defend.

|
Elizabeth
Ob. S. P.

Whether a
Reversion
shall be Assets
in the Hands
of an Heir to
charge him
with Debt on
Bond.

The Opinion of the whole Court (*Nevil* Justice being absent) was, that the Writ and Declaration were good, and that the Verdict well maintained them. On the Defendant's Behalf the Case 24 E. 3. 47. *Br. Tit. Assets* 19. was cited, where it is said by *Thorpe*, that if there be Grandfather, Father, and Son, and the Grandfather makes a Lease for Life, and the Father warrants other Lands; the Grandfather dies, and the Father is seised of the Reversion and dies, and then the Tenant for Life dies; the Heir shall not render in Value for the said Lands, for the Father was not seised of them. But *Bro.* makes a *Quære* thereof, and it is there said, that the Reversion is Assets, as *alibi dicit*.

Vide Salk.
355. Pl. 2.

But on the part of the Plaintiff these Cases were cited, viz. *Jenk's Case*, *Cro. Car.* 151. where in Debt against one as Brother and Heir of *J. S.* on *Ricns per Descend* pleaded, it was found that the Obligor had Issue, which died without Issue, and that the Lands descended to the Defendant as Heir of the Son of his Brother, and it was adjudged for the Defendant, for altho' he was Heir, yet he was but Collateral Heir, and the Declaration ought

ought to have been accordingly, for he had nothing as immediate Heir to his Brother; but the Writ and Declaration here are special; and also *Dyer* 368. pl. 46. *Rolls Abr. Tit. Tryal* 709. nu. 62. in Debt against *A.* as Daughter and Heir to *B.* on *Riens per Descend* from *B.* it was found, that *B.* was seised in Fee, and died seised, having Issue the Defendant, his Wife being *priviment enseint* of a Son, which was afterwards born, and alive, and died within an Hour after. This Issue is found against the Plaintiff, because the Defendant had the Land as Heir to her Brother, who was last seised, and yet that is Assets in her Hands if it had been specially pleaded. See also for that *Bell's Case*, *Hertley* 134. *vid.* a good Case touching that Matter, 3 *Lev.* 286. and 3 *Mod. Rep.* 253. * *Kel-* * This Case
low and *Rowden's Case*. In the principal is likewise in
Case the Plaintiff had Judgment on the first *Show. Rep.* 244.
Argument. *Wright* the King's Serjeant of
Council with the Defendant, *Lutwyche*
with the Plaintiff.

But note, That in the principal Case it is not alledg'd in the Declaration that the Obligor bound himself and his Heirs by the Bill obligatory; but no Notice was taken thereof.

fo. 508.

But if it had been objected, by the Authorities following, it had been amendable; as *Walker* and *Worsley's Case*, *Hutton* 83. where, after a Writ of Error, that Fault was amended as a Misprision of the Clerk by the Statute 8 *H.* 6. So is *Co.* 8. 159. a. in *Blackamore's Case*, and in *Sir Francis Wortbeley's Case*, *Litt. Rep.* 278, 279. there on a Debate of a Point of Amendment, *Richardson* the Chief Justice asked the Prothonotaries if this very thing was

If in Debt on Bond against an Heir the Words [obliged] are omitted, 'tis amendable.

was amendable, and it was answered by them all, viz. *Brownlow*, *Gulfton* and *Moile*, that it shall be amended, which was not deny'd by any; and the greater Opinion in *Forger* and *Sale's Case*, 1 *Jones* 199. is, that it is amendable. The Reason which is given against it by *Jones Justice*, who is of a contrary Opinion in that Case, is because the Attorney had taken upon him to do that which a Council ought to do, and the Act of the Council is not amendable. But it is well known to us at this Day, that Council is never concerned in the drawing of Declarations in Actions of Debt on Bond.

Knight & Ux' v. the Corporation of Wells.

Trin. 6 W. & M. Rot. 364. C. B.

fo. 508.
Debt on
Bond made to
the Feme
Plaintiff *dum*
sola.

THE Plaintiffs declare, that the Mayor, Masters, and Burgesses of Wells, by the Name of the Mayor, Aldermen and Burgesses, &c. haad bound themselves to the Plaintiff Philippa, &c. The Defendants imparl by the Name of Mayor, Masters and Burgesses, and then plead non est factum. Special Verdict that Queen Elizabeth by her Letters Patent had de novo incorporated the said City of Wells by the Name of Mayor, Masters and Burgesses, &c. and that they by that Name might sue and be sued, and granted them several other Privileges, and they further find that King Charles II. by his Letters Patent bearing Date 10 Jan. 35. incorporated the Burgesses by the Name of Mayor, Aldermen and Burgesses, &c. and that a Mayor should be elected in the Manner therein after mentioned, but there is no mention after how he shall be elected; and that one Day was elected Mayor, who

put

put the Seal of the Corporation to the said Bond.
That Day was no Member of the old Corporation,
Et si, &c.

After two Arguments made by the Council of both sides. These two Points were resolved by the Court.

fo. 519.

1. That the Bond was good.
2. That it was not well sued.

And as to the first it was said, that altho' it had been objected that the Bond was void, because Day the Mayor, who put the Seal of the Corporation to the Bond, was not qualified by the last Charter to be Mayor, and so he was but Mayor *de Facto* and not *de Jure*, and therefore his Acts are void; yet the Bond was good. For admitting that he was not qualified to be Mayor, yet he came in to be Mayor by colour of an Election, and was Mayor *de Facto* by means of that Election, and all Ministerial and Judicial Acts done by him are good. An Action will lie against him for a false Return on a Writ of *Mandamus*, the Corporation might have him removed and displac'd; but that not being done, he had Power to seal the Bond. And for that these Cases were cited, 9 H. 6. 32. Pl. 3. *Br. non est Factum*, 3. 2 H. 6. 32. *Br. Title Abbe* 19. Mo. 112.

As to the second Point it was said, that *Salk. 451. pl. 2.* the Suit was not well brought against the Corporation by the old Name of the Corporation with an *alias dict'* by their true Name when the Bond was sealed. For altho' a Corporation by Charter may have two Names to two Purposes, 11 H. 7. 27. and 28. *1 Jones* 262. The College of Physicians against *Butler*, yet it can't have two Names to one and the same Purpose. But a Corporation

tion by Prescription may have two Names, *Hardres* 504. *Cro. El.* 351. *Vaughan* against the Earl of *Bedford*. 21 *E.* 4. 59. 21 *H.* 6. 4. And it was said, that the Name of a Corporation is as essential as a Man's Christian-Name; and if a Man be sued by a false Christian-Name, it shall not avail, altho' it be with an *alias dict'*, 2 *H.* 6. 9. *Pl.* 6. *Br. Variance* 1. 4 *E.* 4. 24. 20 *E.* 4. 6. *Pl.* 7. 3 *Cro.* 897. *Field* versus *James Winlow*, *alias dict' John Winlow*. 2 *Cro.* 640. *Maby* versus *Sheppard*, and 558. *Watkins* versus *Oliver*, and other Cases which are mentioned in the Case of *Sir Robert Clark postea Tit. Error*, Pag.— But in this Case the Corporation is not sued by their true Name; for altho' their old Name by the Charter of Queen *Elizabeth*, was Mayor, Masters and Burgeses, yet that was changed by the Charter of *C.* 2. to Mayor, Aldermen and Burgeses, &c. And by that Name they ought to have been sued, as appears by the Cases before, and *Rolls Abr.* 512. 513. and is as if a Man's Name should be changed by Confirmation. Judgment for the Defendant *per tot' Cur'*.

fo. 520.

Note, The Plaintiffs Council objected that here was an *Estoppel*, for the Defendants have appear'd by the Name of Mayor, Masters and Burgeses (which is the Name by which they are sued) and have taken two *Imparlan-*ces, and therefore are estop to say, that their Name is not so. To which the Defendants Council answer'd, that the Jury were not estopp'd, and they have found the Truth of the Matter, and the Court will adjudge accordingly: But I did not observe that the Court gave any particular Answer to that Objection.

Note,

Note, I don't see how it appears in the Case that the Mayor was not duly elected; for by the Charter of King *Charles* it is mention'd that he shall be elected in Manner and Form after to be express'd, and it doth not appear either by the Letters Patent or by the Verdict how he was to be elected; but it was taken and agreed by all (as I apprehend) that he was but Mayor *de Facto*.

Markes *versus* Marryott.

Trin. 8 W. 3. Rot. 343. C. B.

DEBT on Bond dated 2 July, 7 W. 3. to perform an Award, ita quod it was made in Writing or otherwise ready to be given up, &c. before the 14 August then next. Bar per Arbitratores nullum fecer' Arbitrium. Replication, that the Arbitrators 13 Aug. 7 W. 3. awarded that the Plaintiff should pay the Defendant 31 l. 15 s. in the House of J. Waterford in H. on the 30 Sept. then next. The said Sum to be in Satisfaction of all Actions, &c. and that the Defendant on Payment thereof should deliver to the Plaintiff quiet Possession of a House, &c. and also a Deed of Settlement, &c. and that the Defendant should give to the Plaintiff a general Release of all Demands to the 12th Day of the then Instant August, and also a Warrant of Attorney to acknowledge Satisfaction of all Judgments, &c. and that the Plaintiff on Delivery of Possession, &c. should give such general Release to the Defendant, *de quo quidem Arbitrio* the Defendant had Notice, &c. The Plaintiff answers, that he was ready at the Day and Place aforesaid, and tender'd the said 31 l. 15 s. and that no body was ready to receive it, and that *semper*

fo. 520.
Debt on a
Submission-
Bond.

postea

postea parat' fuit &c. and then assigns for Breach that the Defendant had not deliver'd quiet Possession of the House of, &c. Demurrer and Joinder in Demurrer.

fo. 524.

Two Exceptions were taken in this Case by the Defendant's Council.

If the Submission be conditional and (*inter alia*) mutual, Releases are awarded, which are void; yet if other Matters are awarded to each Party, the Award is good.

1. That the Submission is Conditional; so that the Award ought to be final, which in this Case it is not, for the Award as to the Releases is void, for thereby all Matters to the 12 Aug. (which is a long time after the Submission) are to be released, and the Award of the said Releases is void, and by consequence the whole Award, *sed non allocatur*; for altho' the Releases are void for that Cause, yet forasmuch as other Matters are awarded to each Party, the Award is good as to the Residue. And for that these Cases were cited, *viz.* *Nuby v. Sabb.* 3 Cro. 809. *Lea v. Paine*, Mo. 885. and *Hob.* 191. Same Case cited. *Vide* the Case of *Cockson* and *Ogle*, *postea* pag.

2. That the Condition of the Submission-Bond was, that if the Award was made, &c. ready to be deliver'd, &c. to the Parties, &c. and it is not averr'd in the Replication that the Award was ready to be deliver'd to the Parties, *sed non allocatur*; for when it is once made, it is ready to be deliver'd.

Cro. Car. 541. *Vid.* 3 *Mo. Rep.* * 230. *Rowsby* and *Manning's* *Show.* 98, 242. Case, which is the same Case in Effect as to this Point, and rul'd accordingly. But there is another Reason given, *viz.* that the Condition being that the Award should be deliver'd to the Parties, or such of them as should

* *Quare* if it shou'd not be 330.

should desire it; it ought to be desired, and then if it be deny'd, the Party ought to plead the special Matter.

Strike *versus* Bensley.

Trin. 5 W. 3. Rot. 1802. C. B.

DEBT on a Bond to perform the Award of four Arbitrators, ita quod it was made on or before the 15 Feb. and if not then to perform the Umpirage of T. B. ita quod it was made on or before 23 Feb. Bar, that two of the four Arbitrators made no Award before the said 15 Feb. But that the Umpire 23 Feb. awarded that the Defendant should pay to the Plaintiff 6 l. and should afterwards release to him, &c. and that he should permit the Plaintiff to enjoy such a Close. The Defendant avers that he paid the said 6 l. &c. and that he was alway ready to execute a Release, and that he had not disturb'd the Plaintiff in the Enjoyment of the said Close. Replic', whereby the Plaintiff confesses that the said two Arbitrators did not make any Award, and that the Umpire awarded prout in the Bar; but he farther awarded, that the Plaintiff on the Payment of the said 6 l. should execute a Release to the Defendant, and then he avers that the Defendant hath not paid the said 6 l. but doth not take Issue thereupon, but traverses that the Umpire awarded tantum prout the Defendant hath alledg'd. Demurr' and Joinder in Demurr'

fo. 525.
Debt on a
Submission-
Bond.

This Case was argued several times by the Council of both sides; and the Defendant's Council said, that (as this Case is) a sufficient Breach of the Award made by the Umpire ought to have been alledg'd in the Replication. And for that Jeffery and Guy's

O

Case,

fo. 528.

Case, *Rel.* 78. *Hayman* and *Gerrard's Case*, 2 *Saund.* 102 and 326. *Fuller* and *Spackman's Case*, 3 *Cro.* 66. *Hob.* 199. were cited. But in this Case there was no sufficient Breach assign'd, for the Defendant hath shewn an Award made by the Umpire, whereby (*inter alia*) it is awarded that the Defendant shall pay to the Plaintiff 6 *l.* and the Plaintiff having replied that the Defendant hath not paid them, he ought to have taken Issue thereupon, and not to have concluded with an *Hoc paratus est verificare*. And for that, *Roberts* and *Mariet's Case*, 2 *Saund.* 188. was cited.

fo. 529.

But on the other part it was said, that altho' the Replication is ill, because the Plaintiff hath not taken Issue on the Payment, and also because the Plaintiff hath by the Traverse in the Replication lock'd up the Defendant so that he could not rejoin, yet the Bar is ill, because by the Award the Defendant was to seal and execute to the Plaintiff a general Release. And he saith that *semper parat' fuit* to do it, whereas he ought to have expressly aver'd that he had done it, or that he had tender'd to him a Release, and that he had refused; for the Tender of the Release ought to come of the Defendant's Part, as it is adjudged in *Baker* and *Bulstrode's Case*, 1 *Ventr.* 255. and therefore there was no need of making any Replication; and then the first Fault being in the Bar, the Replication thereunto shall not hurt.

Treby Chief Justice was of Opinion, that it was not requisite in this Case to shew any Breach, because the Bar was merely idle and impertinent; for it doth not appear that the Umpire had any Authority to make an Award, and it is all one as if he had said,

that the Arbitrators had not made any Award before the Submission, or that a meer Stranger had not made any Award: And the Plea here admits that the Arbitrators might have made it, for in the Plea it is said, that two of the Arbitrators had not made any Award before the 15th of *February*, whereas by the Submission they have Authority to do it on the said Day. And he might have demurred to that Plea, and altho' he had replied to it, yet the Defendant having demurred to the Replication, the Plaintiff may take Advantage of the Imperfections in the Bar, because the first Fault is in that. But he admitted that if the Defendant had pleaded no Award made, that then a sufficient Breach ought to have been assigned. But *Powel* Justice was of a contrary Opinion, and said, that true it was that it is a general Rule that Judgment shall be given against him who commits the first Fault, but that it is not so in the Case of an Award. If the Defendant had pleaded *non submisit*, or such collateral Matter, there is no need of any Breach to be assigned, but the Plaintiff may follow the Defendant in his own way. But when the Defendant pleads no Award, or that which is *tantamount*, there a Breach ought to be assigned, and the Plea here amounts to no Award made, and therefore a good Breach ought to be assign'd. The other Judges did not deliver any Opinion in the Case. And thereupon the Plaintiff on his Prayer had leave to discontinue.

Vide Linsey and Astrey's Case, 2 Bulstrode 38. Antea p. 24. and Goldbolt 255. which is a notable Case, as well to the Traverse in the said Case of Strike and Bensley, as to the other Points.

Onyons *versus* Cheese.

Trin. 10 W. 3. Rot. 1582. C. B.

fo. 530.
Debt on a
Submission-
Bond.

DEBT on Bond to perform the Award of two Arbitrators, *ita quod* it be made on or before the 2 Feb. and if not then, to perform the Award of such Umpire as they should appoint, *ita quod* it was made on or before the 12 Feb. Bar, that the Arbitrators or Umpire by them appointed made no Award. Replic', whereby the Plaintiff confesses that the Arbitrators made no Award, but says that the Arbitrators 21 Jan. appointed J. H. &c. who on the 12 Feb. awarded that all Suits between the Parties, or any other on their Account, should cease, and that the Defendant should pay to the Plaintiff 5 l. *erga* his Charges in Law, and the Apothecary's Bill, and other his Costs, and 20 s. to the Plaintiff's Wife for the Abuse done to her, all to be paid on or before the 25 March, and then assigns a Breach in Nonpayment of the 5 l. Demurrer and Joinder in Demurrer.

These Exceptions were taken to this Award.

fo. 533.
An Award
that all Suits
between the
Parties, or a-
ny others on
their Behalf,
shall cease, is
good.

1 Except. That the Award that all Suits between the Parties, or any others on their Behalf, should cease, was void as to Strangers; and the Arbitrators intended the ceasing of the said Suits to be part of the Consideration of the Payment of the said 5 l. for Costs by the Defendant, and inasmuch as he can't have the full Benefit intended for him, the Award is void *in toto*, 1 *Rolls Abr.* 259. nu. 10. *Pope and Skinner's Case*, 2 *Saund.* 292.

Cro. Jac. 200,
354, 584.

2 Except. That the Submission here is conditional (altho' it is only, *Ita quod Arbitrium fiat* before such a Time) as if it had been, *Ita quod*

quod fiat de Premissis præd' before such a Time, as it is adjudg'd in *Inglet and Risden's Case*, 3 Cro. * 438. and then if it is not final, it is void in toto, *Harris and Painter's Case*, *Rolls Arbitrament* 261. nu. 7. But this Arbitriment is not final; for thereby it is awarded that the Defendant shall pay to the Plaintiff 5 l. towards his Charges at Law, and the Apothecary's Bill, and other his Charges: So that the Plaintiff is at liberty to sue for part of them, *sed non allocatur*. And the Plaintiff had Judgment. And the Court said, that the Words (*toward his Charges*) shall be taken in Satisfaction of all Charges. *Lutwyche* of Council with the Defendant.

Towards his Charges at Law shall be expounded in full Satisfaction, &c.

Boswall versus Rawlstone.

Trin. 5 W. & M.

DEBT for 553 l. by Baron Administrator of his Wife on an Indenture dated 27 December, 16 C. 2. whereby Testat' est that the Defendant covenanted with the Wife when sola to pay her 400 l. within three Months after her Marriage, if she should be then alive, and 200 l. more within two Years after her Marriage, if she, or any Issue of her Body, should be then alive, with Interest at 6 l. per Cent' for the 400 l. The Plaintiff avers, that she was married 16 May, 1670. of which the Defendant had Notice, and that she liv'd two Years after her Marriage, and that the said two Sums of 400 l. and the Interest of them, amounted to 553 l.

fo. 533.
Debt by the Plaintiff as Admin' of his Wife.

O 3

To

* Quere, if it should not be 838.

fo. 535.

To this Declaration the Defendant pleaded *Non est factum*, and Issue thereupon, and Verdict for the Plaintiff.

And thereupon *Levinz* in Arrest of Judgment took three Exceptions.

1. *Except.* That the Action is brought only for 553 *l.* But by Computation the true Debt by the Declaration appears to be 556 *l.* and it is not said how the Residue is discharged or *quid inde venit*.

2. *Except.* The Declaration is by way of *Testatum existit*, which may be good in Covenant, but not in Debt.

3. *Except.* That by the Declaration it is alledged, that Letters of Administration were granted to the Plaintiff at *York* by the Archbishop of *Canterbury*, which being a local and judicial Act, and being done out of the Province, is void. And thereupon a Rule was made to arrest Judgment, *nisi, &c.*

Where the Mistake of the Clerk shall not prejudice.

Resp. 1. To the first Exception the Plaintiff's Council answered, That it was only the Misprision of the Clerk, which shall not prejudice the Plaintiff, especially after Verdict: And to that purpose the Case of *Spencer and Drury* 2 Cro. 569. was cited, where in an *Assumpsit* for Goods sold, in the Computation of the Sum total, less was alledged to be done than was; *sed non allocatur*. And also *Parsons* and Sir *John Curson's* Case, where in an Information for Absence from Church for thirteen Months, and the Penalty for eleven Months was only demanded, and yet good. *& non allocat' Exceptio. Tamen quære* there and *vide* 2 Cro. * 478. *Pemberton's* Case. Car. 103. Sir *Thomas Holt's* Case, and

* *Quære* if it should not be 498.

Bayly and Offord's Case. 2 Ventr. 129.

2 Lev. 4.

Resp. 2. To the second Exception it was answered, that there is a Difference between Debt on a Demise, and Debt on Covenant: Where the Pleading by a Testat' exist' is good. In the first it is ill, and in the other good, as it is resolved in *Croker and Child's Case*, 3 Keb. 94. and 115. 2 Lev. 74. and 75. And thereupon this Exception was over-rul'd.

Resp. 3. To the third Exception it was answered, that the granting of Letters of Administration was not a Judicial but a Ministerial Act, and the Bishop is as a Person designed and appointed by the Stat'. *Helyar's Case*, 1 Jones 234. And the Plaintiff had Judgment. *Lutwyche* was of Council with the Plaintiff. A Bishop may grant Administration out of his Diocess.

Wilson versus Constable.

Trin. 10 W. 3. Rot. 1235. C. B.

DEBT for 100 l. on Bond dated 10 Mar. 1691. to perform the Award of T. H. and T. A. Ita quod the Award be made on or before the 10th of May. But if no Award be made by the Arbitrators, then to perform the Award of R. C. Ita quod he made his Award in Writing, or by Word of Mouth before two Witnesses, on or before the 20th of May. Bar, that no Award was made by the Arbitrators or Umpire. Replic', whereby it is confessed, that the Arbitrators made no Award, but the Plaintiff says, that the Umpire 10 Maii &c. ore tenus, awarded that the Defendant should pay the Plaintiff 15 l. and for his Costs expended, &c. 7 l. and that thereupon all Differences between them should cease, &c. That he requested the Defendant

fo. 536.
Debt for
100 l. on a
Submission-
Bond.

fo. 538. *fendant, &c. to pay the said 15 l. and 7 l. Et protestando that he hath not paid them, says the Defendant hath not paid the 15 l. Demurrer and Joinder in Demurrer.*

The Exception to the Replication was, that the Submission to the Award of the Umpire was Conditional, *ita quod* the Award be made in Writing, or by Word, before two Witnesses; and the Plaintiff by his Replication hath aver'd, that the Umpire had made an Award *ore tenus*, but hath not aver'd that it was made before two Witnesses. And for that Judgment was given for the Defendant *Lutwyche* for the Defendant.

Cooper *versus* Hirft.

Pasch. 12 W. 3. Rot. 1626. C. B.

fo. 539. Debt on a Submission-Bond. **D**EBT on Bond to perform an Award. Bar, by *no Award made. Replic', that the Arbitrator awarded that the Def. should pay to the Plaintiff 12 l. such a Day, and that the Def. abduceret Equum & Pullam suam infra unam Septiman' a praedicta Georgio (the Plaintiff.) Breach for Nonpayment of the 12 l. Demurrer and Joinder in Demurrer.*

fo. 540. An Award Opinion of *Blencow* Justice, Judgment after that the Defendant shall pay, &c. and take away his Mare and Colt from the Plaintiff, is good. *two Arguments was given for the Plaintiff on this Reason, viz. because it appears by the Award, that the Plaintiff at the time of the making thereof had the Possession of the Mare and Colt, which Possession shall not be intended a tortious, but rather a legal Possession, as for Damage feasant, Bailment or any other such Matter, whereby the Plaintiff might have justified the Detention of them; and then the Award would be mutual.*

fo. 541.

tual. But a Writ of Error was brought. Girdler and Lutwyche of Council with the Plaintiff.

Elliot *versus* Cheval.

Trin. 11 W. 3. Rot. 1920. C. B.

DEBT on Bond dated 4 May, 10 W. 3. to perform an Award, ita quod it is made on or before the 21st of May Instant, and in default thereof to perform the Award of a third Person to be nominated by the Arbitrators. Bar, by no Award made by the Arbitrators, but that they the 20th of May nominated J. H. to be Umpire, who on the 28th of May by Writing, &c. awarded the Defendant to pay to the Plaintiff 40 l. the 11th of June then next, which he had paid. Replic', Oyer of the Arbitrament, which recites that there had been considerable Dealings between the Plaintiff and the Defendant, and that the Plaintiff had paid to the Defendant all his Demands, and that 40 l. were due to the Plaintiff, and therefore he awarded the Payment of the said 40 l. to the Plaintiff. And then says, that the Defendant hath not paid the said 40 l. Et hoc petit &c. To which the Defendant demurs.

fo. 541.
Debt on a
Submission-
Bond.

One Objection was made, that the Award was of one Part only ; but the Court resolved, that for as much as the Umpirage recited that there were Dealings between the Plaintiff and the Defendant, and that the Plaintiff had paid to the Defendant all that was due to him, and then order'd the Defendant to pay to the Plaintiff that which was due to him, it shall be intended that it was

fo. 544.
An Award
made good by
the Recital.

to

to be in full Satisfaction of the Debt due by the Defendant to the Plaintiff.

An Award made by an Umpire elected by the Arbitrators during the time they had to make their Award, yet good.

Another Objection was made by the Defendant's Council, that the Arbitrators had Power to make their Award on or before the 21 *May*, and they had elected an Umpire before that Day, *viz.* the 20th Day of that Month, at which time the Arbitrators had not any Power to make such Election, and by Consequence the Umpire had not any Authority to make an Award; for the Arbitrators had Power till the End of the said 21st Day of *May* to make their Award, *sed non allocat'* because no Award being made by the Arbitrators, the Award of the Umpire is good; and the Plaintiff had Judgment. *Birch* of Council with the Defendant. For this last Point *vide* *Cro. Car.* 263. *Jennings v. Vandiput*, 1 *Rolls Abr.* 262. *nu.* 5. 2 *Jones* 167. *Case and Dure's Case*, and 2 *Mod. Rep.* 169. 2 *Saund.* 133. All which are Authorities for the Resolution here. But see also 1 *Lev.* 285. *Copping v. Haverrard*, and 302. *Donavan v. Mafcall*, 1 *Rolls Abr.* 262. *nu.* 6.

Lee *versus* Elkin.

Trin. 13 *W.* 3. *Rot.* 1802. *C. B.*

fo. 545.
Debt on a
Submission-
Bond.

DEBT on a Bond to perform an Award, *ita quod fiat before such a Day without saying ita quod fiat (de premissis.)* Bar, by no Award made. Replic', the Plaintiff shews the Award, which recites that there were Differences between the Plaintiff and the Defendant concerning a Sale made by the Defendant to the Plaintiff of a Hedge and a Parcel of Land, &c. which Hedge was afterwards recovered

recover'd by one S. and concerning the Costs which the Plaintiff had sustain'd, &c. And then it is awarded, 1. That the Defendant should pay all his own Costs till the Day of the Submission. 2. That he should execute a general Release to the Plaintiff of all Actions, &c. unto or upon the same Day. 3. That he should deliver to the Plaintiff all the Deeds mention'd in the Award referring to the Premises. 4. If he did not deliver them, then that he should pay to the Plaintiff 50 l. 5. That the Defendant should procure double Sixpenny Stamps to certain Indentures relating to the Premises. 6. That the Defendant should pay to the Plaintiff 11 l. for the Costs in the Suit recited in the Award *super vel ante septimum diem Maii sequen'* and that the Defendant should give a Bond of 74 l. with a Condition to pay the said 11 l. and that the Plaintiff on the Performance thereof should execute a Release to the Defendant of all Actions, &c. *usque vel super* the Day of the Submission. Breach, that the Defendant hath not paid the said 11 l. *secundum formam & effectum arbitrii præd'* whereupon the Defendant demurs.

One Exception was taken to the Replication, that the Breach was not well assigned; for by the Award the Defendant was to pay to the Plaintiff 11 l. *super vel ante* the 7th Day of May, and the Breach assigned is, that the Defendant had not paid the 11 l. *secundum formam & effectum arbitrii præd'* where he ought to have alledged, that he had not paid the said 11 l. *super vel ante* the said Day, according to the Words of the Award, so that the Defendant might have taken one single Issue, either on the one or the other: And for that *Dier 243. b.* was cited, which Book seems to be an Authority in point. *Sed non allocatur*; for altho' the Court declared, that

fo. 549.

An Award to pay *sup' vel ante* such a Day, that he did not pay *secundum formam &c.* is a good Breach.

that it had been better if the Breach had been assigned according to the Words of the Award, yet they were of Opinion that the Breach was well enough in Substance. But *vid. Brooke's and Dean's Case*, 1 Lev. 145. and 3 Lev. 293. *Walnough and Holgate's Case*, 2 Mod. Rep. 269. in *Harword's Case*, and *nota*.

Divers Exceptions were taken to the Award it self, which were severally answered by the Council of the other side; but to make a particular Recital of them would be too long, and not agreeable to the Design of this Book. And therefore I will only mention the Resolution of the Court on the whole Matter.

The Opinion of the greater part of the Court was, that the Release by the Award to be made by the Plaintiff to the Defendant if it had been executed, had been a Release of the Submission-Bond, and that the Submission was Conditional, as well to the Matter of the Award, as in respect of the Time to make the Award. But notwithstanding they were all of Opinion, that the Award was good, because it was a particular Satisfaction and mutual Recompence as to each particular Matter awarded. *Carthew of Council with the Plaintiff, Hook and Lutwyche with the Defendant.*

Cockson *versus* Ogle.

Trin. 13 W. 3. Rot. 1559. C. B.

fo. 550.
Debt on a
Submission-
Bond.

DEBT on Bond dated the 6th of November, 12 W. 3. to perform the Award of G. C. and C. A. *ita quod fiat in Writing on or before the*

6th

6th of December. Et si non &c. then to perform the Award of E. B. ita quod it be made in Writing under Hand and Seal, on or before the 12th of December. Bar, that no Award or Umpirage was made. Replic', whereby 'tis confessed, that the Arbitrators made no Award, but saith, that the Umpire 12 Decemb. &c. awarded, 1. That all Actions should cease. 2. That the Defendant should pay to the Plaintiff 12 l. 15 s. 3 d. 3. That the Defendant should deliver to the Plaintiff certain Goods particularly mentioned, and three Boxes, and several Books, without naming them. And that the Plaintiff should deliver to the Defendant several Goods by Name. But if any of the Goods were mislaid or lost, then the Parties to pay the Value thereof, to be appraised by the Umpire and the Arbitrators. And that the Parties should execute mutual Releases. Breach for Nonpayment of the 12 l. 15 s. 3 d. Demurrer and Joinder in Demurrer.

In this Case it was agreed by the Council on both sides, that the Submission being conditional, *scil'* with an *ita quod fiat de præmissis*, if it appears by the Award it self that it is not final, in respect of all the Matters in the Submission to the Award, it is ill in the Whole; and so it was resolved by the whole Court.

2. *Resol.* Secondly it was resolved, that the Award to deliver three several Boxes, and several Books, was altogether uncertain and void, unless it had been said that the Books were in the Boxes.

3. *Resol.* That altho' there is no Time appointed by the Award for the Execution of the Releases of both sides, nor that it shall be done on or after the Performance of the other parts of the Award; yet it was resolv'd that the Award being void in respect of the Delivery

fo. 554.

If an Award on a conditional Submission is not final, 'tis void in the whole.

An Award to deliver several Books without naming them, &c. is void.

If an Award be void, neither Party is obliged to perform it.

Delivery of the Goods, neither the one nor t'other was obliged to perform it ; for then the Goods would be released without any Satisfaction, which (as was said by one of the Judges) would be absurd.

Another Point was moved in the Case, whether the Umpirage was not void, by Reason that the Umpire had reserv'd to himself and the two Arbitrators (who were elected to determine the Matters before him) to make a Valuation of the Goods which were lost or missaid ; and as to that *Trevor* Chief Justice, and *Blencow* Justice, were of Opinion, that it was a judicial thing, and not merely ministerial, and that the Award was void for that ; but *Powel* Justice was of another Opinion. But they all agreed that Judgment should be given for the Defendant, and so it was. *Nota* a good Case. *Pratt* and *Ja. Selby* of Council with the Plaintiff, *Cartew* with the Defendant.

Cro. Car. 383. On the Part of the Defendant, to prove
 2 *Ven.* 242, that the Award being on a *Conditional Submis-*
 243. *Cro. El.* sion ought to be final, these Cases were cited,
 726. *Pl.* 59. *Cro. Ja.* 200. and 354. *Hob.* 49. 4 *Leon.* 49.
Salk. 75. *Pl.* 16. And of the Part of the Plaintiff as to that

Point, these Cases were cited, *Saun.* 2. 292. *Pope* and *Brett's* Case. 2 *Lev.* 3. *Pinkney* and *Bullock's* Case, 2 *Keb.* 759. 3 *Lev.* 413. *Bargrave* and *Atkins's* Case. As to the Point of the Valuation of the Goods, these Cases were cited on the part of the Plaintiff, viz. *Palmer* 145. 2 *Cro.* 584. *Stiles* 217. And on the part of the Defendant, *Sid.* 358. *Cro.* 2. 314. and 584. 2 *Rolls Rep.* 214. *Palmer* 146.

For the first Point of the principal Case, vid. the Case of *Lee* and *Elkins*, *antea* p. 202. and note the Diversity.

Gatland

Gatland & D. Ux' versus Chatfield.

Mich. 11 W. 3. Rot. 348. C. B.

DEBT on Bond, with a Condition in Effect to perform Covenants in certain Articles, one of which was to pay to the Plaintiff (being a Feme sole) 10 l. per Ann' as long as the Defendant and Plaintiff insimul cohabitarent (Anglice shall live together.) Bar, that the Plaintiff and Defendant at the time of making the said Bond and Articles, or at any time after, minime cohabitaver'. To which the Plaintiffs demur.

fo. 555.
Debt on
Bond made
by the Defen-
dant to the
Plaintiff dum
Sola.

After two Arguments Judgment was given for the Plaintiffs, because the Court was of Opinion, that the Words in the Articles, shall live together, should be taken and intended to be living together in Time, and not in Place, and by Consequence that the yearly Sum of 10 l. was payable during the joint Lives of the Plaintiff Dorothy and of the Defendant.

fo. 557.
Exposition
of the Words
insimul cohabi-
tar'

William Lambard versus John Kingsford.

Mich. 11 W. 3. Rot. 341. C. B.

DEBT on a Bond to perform the Award of two Arbitrators to be made under their Hands and Seals, &c. Bar, by no Award made. Replic', that the Arbitrators susceper' sup' se onus arbitrii præd' per scriptum &c. sigillis eorum sigillat' arbitrat' fuer' that the Defendant should pay to the Plaintiff 66 l. at the then Mansion-House of the Plaintiff in Sennock præd' &c. For the Nonpayment

fo. 558.
Debt on a
Submission-
Bond.

Nonpayment whereof the Breach was assigned. To which Replication the Defendant demurred.

fo. 560.

These Exceptions were taken by Sir Nathan Wright, then the King's Serjeant, now Lord Keeper of the Great Seal.

1. That it is not aver'd that the Award was made under the Hands and Seals of the Arbitrators, but only by Writing indented, *Sigillis eorum sigillat'* And for that he cited 2 Cro. 278. *Sallows v. Girling*. Vide also for that, *Palmer* 97. *Bradshaw's Case*; 109. *Thaire's Case*; and 121. *Rolls Arbitrament* 245. Nu. 25.

fo. 561.

2. That after the Words in the Replication, viz. *Quod Arbitratores susceper' sup' se onus arbitrii præd'* the Word *Et* should be inserted after those Words, and before the Words *per Scriptum &c. arbitraver' &c.* and for want of that Word *Et*, it doth not appear that the Award was made in due time.

3. That the Money awarded to be paid to the Plaintiff by the Defendant, is awarded to be paid at the Plaintiff's House at *Sennock præd'* and no such Place is named before.

1. To the first Exception *Henry Selby*, Serjeant, answer'd, that altho' it was not alledg'd in the first part of the Award, that it was made under the Hands and Seals of the Arbitrators, yet it is afterward said, that it was ready to be deliver'd, &c. under their Hands and Seals, which is sufficient.

Where the Omission of the Word *Et* will not vitiate.

2. To the second 'twas answer'd, that the Word *Arbitratores* is the Substantive, which governs all the Verbs in the said Sentence, and is all one in Effect as if it had been said, *Quod Arbitratores præd' cæper' super se &c. Arbitrat' præd' arbitraver' Arbitrator' præd' ordinaver' Arbitrator' præd' determinaver' & Arbitrator' præd' adjudicaver'.*

3. To

3. To the third Exception 'twas answer'd, *Antea* 428. that the Word *præd'* being annex'd to the *Savil* 71. Cro. Word *Sennocke*, that Word *Sennocke* not being *El.* 697. Pl. 7. mention'd before, was void. And for that *Bulstr.* 198. and 199. was cited.

And notwithstanding these Exceptions the Plaintiff had Judgment: And it was affirmed on a Writ of Error in *B. R.* as the said *Selby* Serjeant, who was of Council with the said *Lambard* in the Writ of Error, inform'd me.

The Mayor, &c. of Bedford versus Fox.

Trin. 9 W. 3. Rot. 1784. C. B.

THE Plaintiffs declare that the City of *B.* is *fo. 562.*
 an ancient Borough, and incorporated by the *Debt for 7l.*
 Name of Mayor, &c. That there was a Custom, *on the Breach*
 &c. to make By-Laws. That a By-Law was made *of a By-Law.*
 16 Septemb' 7 W. 3. whereby it was ordained,
 that no Person not being a Freeman, &c. should
 exercise any Art, &c. within the Borough, &c. on
 the Forfeiture of 5 s. per diem &c. to be paid to
 the Chamberlain for the Use of the Corporation, and
 to be levied by Distress, or recover'd by Action of
 Debt, &c. That the By-Laws were approved by the
 Justices of Assize, and published. That the De-
 fendant after the said Publication, &c. being no
 Freeman, did exercise the Trade of a Tanner for
 28 Days, contra &c. per quod Actio &c. De-
 murrer and Joinder in Demurrer.

These Exceptions were taken to this De- *fo. 564.*
 claration.

1. That the Name of the Corporation is
 Mayor, Bailiff, Burgeses and Commonalty;
 and the Custom to make By-Laws, is that the
 Mayor, Bailiffs and Commonalty are to
 P make

make *By-Laws*, omitting Burgeſſes ; ſo that there is a material Variance in the Name of the Corporation.

2. The Custom to make the *By-Laws* ought to be ſtrictly purſued, and therefore it ought to have been alledg'd, that the *By-Law* was made by the Mayor, Bailiffs and Commonalty ; but in the Declaration it is only alledg'd, that the *By-Law* was made by ſome particular Perſons by Name.

A *By-Law* that no Perſon not being a Freeman, &c. ſhall exerciſe his Trade, is not a good *By-Law*.

3. That the *By-Law* it ſelf was unreaſonable, and againſt Law, becauſe by this *By-Law* all thoſe who have ſerved as Apprentices in the Corporation, are excluded from exerciſing their Trades ; and for that the Caſes of *Norris* and *Staps*, *Hob. 210.* of the Taylors of *Ipswich*, *Co. 11. 53.* The Caſe of the City of *London*, *Co. 8. 121. b.* and the Caſe of the Mayor and Commonalty of *Colcheſter*, *Carter's Rep. 68. and 114.* and the Caſe of the Corporation of *Clothworkers*, *Godbolt 252.* were cited. Where it is adjudg'd, that if the King by his Charter incorporates a Village, and by the ſame Charter grants to them, that no Perſon ſhall uſe a Trade within the ſame Village, unleſs he was approv'd by them, or two of them, that it is a void Charter, becauſe it was againſt the Liberty of the Subject, and tended to a Monopoly ; and if the King by his immediate Power can't make ſuch a Law, no derivative Power can do it : And by the Opinion of the whole Court Judgment was given for the Defendant, becauſe the *By-Law* was not good. But the Court was of Opinion, that a Custom to the Effect of the *By-Law* would be good. *Lutwyche* was of Council with the Defendant.

Salk. 204.

Chaloner

Chaloner *versus* Davis.

Hill. 9 W. 3. Rot. 1175.

DEBT for 100 l. on Articles whereby the Plaintiff covenanted with the Defendant to convey to him on or before such a Day, a Messuage, &c. in S. in Com' Bucks. And the Defendant covenanted with the Plaintiff, that he at the Time of the Execution of such Conveyance, and in consideration inde, would pay to the Plaintiff, or his Assigns, 503 l. at the House of Sir Francis Child at Temple-Bar, London; and for the Performance of the Articles, the Parties bound themselves in 100 l. Averment, that one M. Lessee for Years of the Messuage, &c. and the Plaintiff being the Reversioner, made a Lease, and Release, &c. and deliver'd them to the Use of the Defendant. Et in factō dicit that the Defendant de Premissis noticiam habuit, but had not paid the 503 l. secundum formam &c. per quod Actio &c. To this the Defendant demurs.

fo. 565:
Debt for
100 l. on
Articles.

These Exceptions were taken to this Declaration:

1. That the Execution of the Conveyance ought to precede the Payment of the Money; and then if the Plaintiff hath not sufficiently shewn that he hath executed such Conveyance, he hath not entitled himself to the Action. And that the Execution of the Conveyance ought to precede the Payment of the Money; the Defendant's Council said, that by the Articles no certain Day was appointed for the Payment of the Money; but by the Agreement of the Parties it was to be reduced to a Certainty by the Plaintiff's Act, viz. the Execution of the Conveyance.

fo. 569.
Antea 249,
493. 7 Co. 10.
b. Cro. Jac.
623. pl. 15.
1 Ven. 147,
177, 214. Salk.
112, 171.

By the Articles, the Conveyance was to be made on or before the 17th Day of *November* then next following ; and, as it seems, if the Plaintiff had executed a Conveyance before that Day, he might have an Action for the Money immediately after : By which it is prov'd, that the Duty accrued to the Plaintiff after the Execution of the Conveyance, and not before. If the Covenant had been to convey the Lands on a Day certain, then there had been some Colour that the Words *tempore executionis, & in consideration inde &c.* should refer to the said Day, and not to the Execution of the Conveyance : And yet in that Case it hath been adjudg'd that the Payment of the Money shall refer to the Act to be done, and not to the Day in which it was to be done ; and for that *vide* the Case of *Elwick and Cudworth, antea Pag. 178.* And further to prove that Point, these Cases were cited, *viz. Lee and Exelby's Case, 3 Cro. 888. Duck and Vincent's Case, 2 Mod. Rep. 33. and the Case of Shales and Signoret, Intrat. Pasch. 10 W. 3. Rot. 158. B. R.* Where the Plaintiff covenanted with the Defendant to transfer to the Defendant 400 *l.* in the Bank-Stock, and the Defendant covenanted that he would accept it, and that *tempore translationis inde* he would pay so much to the Plaintiff. And in an Action for the Breach of that Covenant the Plaintiff declar'd, that he had given Notice to the Defendant ; that he at such a Day and Place would transfer, &c. and had appointed the Defendant to be there, &c. which he refused ; and the Breach was assign'd in the Nonpayment of the Money. But Judgment on Demurrer was given for the Defendant, because it appeared by the Plain-

Plaintiff's own shewing, that there was no Transfer, and till that was done no Money was due. It was also insisted, that the Defendant's Covenant in the Case here, was in the Nature of a Condition of a Bond, because he was to forfeit 100 *l.* Penalty, and therefore the Covenant ought to be construed more favourably for the Defendant; and for that the Case of *Bold and Molineux*, *Dier* 17. was cited. And the Opinion of the whole Court was, that the Execution of the Conveyance was to precede the Payment of the Money.

And as to the Point of Pleading the Execution of the Conveyance, the Defendant's Council said, that it was not well pleaded, because on the whole Matter there was a Surrender of *Markham's* Interest to the Plaintiff, and by Consequence the Lease for a Year was only the Lease of the Plaintiff, and then the Plaintiff ought to have declared on the Verity of his own Case, according to the Operation of the Law on the whole Matter of Fact, which not being done, the Declaration is therefore ill; and for that these Cases were cited, *viz.* *Chester and Williams's* Case, 2 *Saun.* 96. and 97. *Cook and Bromhill's* Case, *Noy* 66. *Hall and Seabright's* Case, 1 *Mod. Rep.* 14. *Butt's* Case, *Co.* 7. 24 b. and *Lade and Baker's* Case, 2 *Ventr.* 149. and 260. and 266. And the Opinion of the Court as to that Point was, that the Declaration was ill; for as it was said by *Powel* Justice, a Tenant for Years can't make a Lease within the Statute of Uses, and by that Means give Possession to the Defendant to make him capable of a Release of the Reversion. That the Payment of the Money doth not depend on

the Execution of the Conveyance these Cases were cited by the Plaintiff's Council, 1 *Saun.* 320. and 1 *Keb.* and 2 *Keb.* 542. *Porridge* and *Cole's Case*, *Peters* and *Opies's Case*, 2 *Saun.* 250. *Huntlock* and *Blackton's Case*, 2 *Saun.* 155. 2 *Mod.* 33. and 34. 2 *Jones* 179. 3 *Cro.* 625.

2. That by the Articles the Plaintiff was to seal and execute to the Defendant, or his Assigns, a good and sufficient Assurance, &c. And the Declaration is, that he had sealed and delivered to the Use of the Defendant, a Lease and Release, which is no sufficient Averment of the Performance of the Covenant in that Respect; for perhaps they were deliver'd to him, who would not deliver them to the Defendant, and the Defendant hath not any Means to compel the Delivery to him, because the Plaintiff hath not named any Person to whom he hath deliver'd them; and for that Exception these Cases were cited, viz. *Tanfield* and *Green's Case*, *Noy* 18. 4 *Leon.* *Case* 148. *Bease* and *Drayton's Case*, 3 *Cro.* 143.

fo. 571.

3. That the Defendant's Covenant was to pay the 503 *l.* to the Plaintiff, or his Assigns; and the Declaration is only that he hath not paid them to the Plaintiff, but doth not say, or his Assigns, and for that Exception the Case of *Celt* and *Howes*, 3 *Cro.* 348. *Penfor's Case*, 3 *Keb.* 440. *Abbot* and *Bishop's Case*, 2 *Sid.* 41. were cited.

Antea p. 170.

4. That the Covenant is, that the Defendant should pay the Money on the Execution of the Conveyance, at the House of Sir Francis Child, &c. And the Declaration is, that he hath not paid *secundum Formam & Effectum Articulorum*, which is not good Plead-

ing;

ing; for there being a Time and Place for the Payment appointed, he ought to have alledg'd that the Money was not paid at such Time and Place; and for that Exception the Case of *Elbournough and Yates*, 2 Keb. 874. was cited. But now as to that Exception *vide Brookes and Dean's Case*, 1 Lev. 145. *Walnough and Holgate's Case*, 3 Lev. 293. 3 Cro. 281. *Fox and Lee's Case*; *Harwood and Bincks's Case*, 2 Mod. Rep. 268, 269. and *Lamplugh and Shiers's Case antea*, p. 124. and Cro. Car. 560. But there was no Resolution of the Court on these three last Exceptions. Gould the King's Serjeant, and Girdler, were of Council with the Plaintiff, *Birch and Lutwyche* with the Defendant. For the first Point of this Case, *vide the Case of Thorp and Thorp, antea* p. 88.

Lynch & Templeman *versus* Clemence.

Mich. 11 W. 3. Rot. 364. C. B.

DEBT by Lynch and Templeman on a Bond to perform an Award. The Case in Effect was, a Bond was made by the Defendant to Elizabeth Templeman in Trust for the Plaintiff Templeman; Elizabeth was afterwards married to the Plaintiff Lynch; then a Bond is made by the Defendant to both the Plaintiffs, to stand to the Award, &c. of Arbitrators, elected as well on the part of the Defendant as of the Plaintiff Lynch, to arbitrate all Controversies, &c. between the said Parties, or either of them. The Arbitrators by their Award, reciting that there were several Differences between the Plaintiffs on the one part, and the Defendant on the other part, and that they had all submitted, &c. by several Bonds, reciting also that the

fo. 571.
Debt on a
Submission-
Bond.

Defendant was bound to Eliz. Templeman, now Wife of the Plaintiff Lynch, and that the said Bond was in Trust for the Plaintiff Templeman, and that 117 l. was due on that Bond, awarded that the Defendant should pay to the Plaintiff Templeman 83 l. and should assign a Debt due to the Defendant, &c. and should make an Affidavit, &c. that the Debt was a just Debt, &c. and if he fail'd, then to pay 34 l. to the Plaintiff Templeman over and above the 83 l. and that the Plaintiff Templeman should on Performance deliver to the Defendant the Bond made to Elizabeth Templeman, and that the Plaintiff Lynch should execute a general Release to the Defendant. Breach, that the Defendant had not paid the 83 l. Rejoinder, that the Plaintiff Templeman non submisit. Demurrer and Joinder in Demurrer.

fo. 575.

This Case was argued in *Trin. Term* 1700, and once or twice before. As to the Objection that had been made before, That it appears by the Condition of the Submission-Bond that the Plaintiff *Templeman* was not any Party to the Submission, because the Condition is, that if the Def. *Clemence* *staret ad & perform' Arbitrium &c.* it was now answer'd by the Plaintiff's Council, that here was a good Submission by *Templeman*. And as to that, the Case in Effect is but thus: A Bond is made by the Defendant to *Elizabeth Templeman* in Trust for the Plaintiff *Templeman*, which *Elizabeth* is after married to the Plaintiff *Lynch*; then a Bond is made by the Defendant to both the Plaintiffs, with Condition that the Defendant shall stand to the Award of Arbitrators indifferently elected, as well on the part of the Defendant as of the Plaintiff *Lynch*, to arbitrate all Matters in Controversy between the said Parties, or

fo. 576.

either

either of them. Now when *Lynch* married with *Elizabeth Templeman*, who was Trustee for the Plaintiff *Templeman*, *Lynch* became Trustee for *Templeman*; then when *Templeman* joins with *Lynch* his Trustee in taking the Submission-Bond, it plainly appears that he hath assented and agreed, that the Matters in Controversy touching the Bond taken by him in the Name of *Elizabeth Templeman*, should be determined by the Arbitrators, which amounts to a Submission to their Award.

The Plaintiff *Lynch*, by the Assent of *Templeman*, submitted for himself and *Templeman* touching the said Bond made to *Elizabeth Templeman*, and so the Plaintiff *Templeman* is not a meer Stranger to the Matter, as hath been objected on the other side; for he is a Party to the Submission-Bond, and for his Benefit the Submission is; and the Money which was payable on the Bond made to *Elizabeth Templeman*, in Equity belongs to him, and by the Consent of his Trustee it is to be paid to him, which is all one in Effect as if it had been awarded to be paid to *Lynch*; and if it had been paid to *Lynch*, at last it would be paid to the Plaintiff *Templeman*. So that it is all one in effect, as if it had been awarded that the Money should be paid to *Lynch* to the Use of the Plaintiff *Templeman*. And also there is a strong Presumption in the Condition of the Submission-Bond, that *Templeman* had submitted himself, and that it was a meer Slip in the Scrivener who made the Bond, that the Name of *Templeman* was omitted. For the Condition is, to stand to the Award of Arbitrators indifferently elected, as well on the part of the Plaintiff *Lynch*

as

as of the part of the Defendant *Clemence*, to determine all Matters between them, or either of them; which Words, or either of them, would be impertinent and insignificant, if there were not two Persons of one Part.

Where a thing awarded to be done to a Stranger to the Submission, shall be good.

A. and *B.* were bound to stand to the Award of *J. S.* concerning a Matter arising on the part of *B.*'s Wife before Coverture. *J. S.* awarded, that *A.* should pay to *B.* and his Wife 10 *l.* and it was held that the Award was good, altho' the Wife of *B.* was a Stranger to the Submission, because the Controversy is by reason of the Wife. *Mar.* 77 and 78.

Where an Award shall be good by reason of Remedy in Equity.

And moreover it was said, that if there be Remedy in Equity to have any thing awarded to be executed, the Award is good. And for that 17 *E. 4. 5. b.* was cited, where it is held by the Court, that if an Award be made before the Statute of Uses, that *Cestuy que Use* should cause his Feoffees to make a Release to one in Possession of the Lands, that it is a good Award, because *Cestuy que Use* may by *Subpœna* compel the Feoffees to do it. An Award that *A.* shall discharge *B.* of his Undertaking to pay a Debt to *C.* is good, 1 *Mod. Rep. 9. Becket v. Taylor* adjudg'd. And if it is awarded that one shall acquit the other of a Bond wherein they are both bound to *B.* for Payment of 105 *l.* that is a good Award, for altho' he can't compel *B.* being a Stranger, to deliver up the Bond, or to make a Release by the Common Law, yet if the Bond be not forfeited, he may pay the 105 *l.* to *B.* at the Day, and that will acquit the other; and if it was forfeited, yet on Satisfaction given he may compel *B.* to deliver up the Bond, or to give a Release, in a Court of Equity

Equity, P. 15 *Car. B. R.* between *Darsey* and *Clipsham*, adjudg'd on Demurrer, 1 *Rolls Abr.* 248. Nu. 11.

It hath been objected, that by the Release the Submission-Bond would be released; but that is not so, for the Award is only general, that the Plaintiff *Lynch* should make a general Release, which is to be intended of all Matters to the Time of the Submission, *Allein* 87. *Kinaston* and *Jones's* Case. But admitting that it had been to the Time of the Award made, yet it had been good, because all the Matters awarded were to be performed before the Release was to be executed. *Rolls Abr.* 260. Nu. 3. *Raymond* 169. *Barker* and *Durrant's* Case.

Where an Award shall be good tho' a Release is awarded which would discharge the Submission.

On the Part of the Defendant it was said, that the things awarded to be done by the Defendant were to be done to a Stranger, and some Cases were cited where Awards were adjudg'd to be void for that Reason, which I omit because as it seems they do not tend directly to the Determination of this particular Case.

At another Day in the said *Trinity-Term* 1700, Judgment was given for the Plaintiff by the Opinions of the *Treby* Chief Justice, *Nevil* Justice and *Powel* Justice. And first as to the Submission, it was said, that in as much as *Templeman* was one of the Obligees in the Submission-Bond, and thereby had assented to an Award; and forasmuch as the Arbitrators have by their Award affirmed that *Templeman* had submitted to their Award, as well as *Lynch* and *Clemence*, they would give Credit thereunto, and the Parties to the Submission-Bond are estop'd to say the contrary. And it was also said, that it was

was not absolutely necessary that the Submission should appear by express Words in the Condition of the Bond, on which the Suit is founded; for it may appear by the Bond made by *Templeman* to the Defendant for the Performance of the Award, and for that the Case of *Hayes and Hayes*, 1 Cro. 433. was cited, which is a strong Case to that Purpose.

And as to the Award it self, they said that the Award was good, for the Reasons before given, and also because the Trustee and *Cestuy que trust* are as one Person; and if the Money had been paid to the Plaintiff *Lynch*, it had been clearly good; and that Tender to, and Refusal by the Plaintiff *Templeman*, of the Money awarded, had been a good Plea to an Action of Debt on the Bond made to *Eliz. Templeman*; and that if the Money had been to be paid to the Plaintiff *Lynch*, then the Award had been clearly good. But then *Lynch* would be compell'd in Equity to pay it to *Templeman*, and so it is in Effect doing that at first, which would be done at last, and by the Payment to the Plaintiff *Templeman* the Defendant's Bond would be discharged as well as if the Money had been paid to *Lynch*, and *Lynch* also would thereby be discharged of his Trust, which is for his Benefit; so that each of the Parties will have a just Benefit by this Award.

And beside the Cases before-cited, another strong Case was cited by *Powel* Justice, to prove that this Award was good in Equity, viz. 1 *Rolls Abr.* 249. nu. 11. He also cited other good Cases, viz. 3 *Leon.* 211. 5 *H.* 7. 22. 22 *H.* 6. 46. 1 *Rolls Abr.* 247. nu. 6. But *Blen-*
cow Justice was of Opinion that the Award

was

was void, because *Templeman* was not compellable in Equity to accept of 88 l. which appears to be less than his Debt: And for the Assignment of the Defendant's Debt to him for the Residue, no Court of Equity would compel him to accept of such Paper Security in lieu of Money due to him, especially it being revocable at the Defendant's Pleasure. But notwithstanding that, Judgment was given by the other Justices for the Plaintiff; for they were of Opinion that a Court of Equity would make the said Award effectual in every thing for which there was any need of Equity. *Levinz* was of Council with the Defendant; *Lutwyche* with the Plaintiff.

Note, That it was said by the Chief Justice that he had the Report of the Case of *Becket* and *Taylor* before-cited, 1 *Mod. Rep.* 9. and that the chief Reason of the Resolution in that Case was, because there was Remedy in Equity. He also said that he thought the Omission of *Templeman's* Name in the Condition was but a Misprision, for the Reason before given, viz. by reason of the Words (or either of them) and therefore there was great Reason to support the Award, if it was possible.

Duke of Bolton versus Clarke.

Hil. 9 W. 3. Rot. 1884. C. B.

DEBT on Bond with Condition that P. H. the Plaintiff's Steward should account for, and pay all Sums collected by him of the Plaintiff's Rents. The Defendant pleads Performance generally. The Plaintiff replies that P. H. had received 7000 l.

fo. 579.

7000 l. which he had not paid, &c. The Defendant rejoins and saith, that bene & verum est that P. H. had received 500 l. and given an Account thereof, and paid all that was due on the Account, viz. 30 l. Demurrer and Joinder in Demurrer.

fo. 581.

Two Exceptions were taken by the Plaintiff's Council:

1. To the Bar, that it was not good, because the Condition in several parts thereof is in the disjunctive, and therefore general Performance is no Plea, *Horne and Barber's Case*, Cro. Car. 421. *Lea and Luthelf's Case*, 2 Cro. * 550. *Oglethorp and Hide's Case*, Cro. Eliz. 232. and 1 Leon. 311. Co. Litt. 303. b.

Where Conditions are in the disjunctive, general Performance is no Plea. 8 Co. 133. b. One can't plead *quod bene & verum est* where the same Matter is not alleged before.

2. An Exception was taken to the Rejoinder. By the Replication it is positively alledged, that *Hamond* had received several Sums, amounting to 7000 l. and the Defendant rejoins, *Quod bene & verum est* that *Hamond* received 500 l. & non ultra, and that he had given a true Account thereof, which is no Answer to the Charge in the Replication, of the Receipt of 7000 l. for the Replication doth not charge that *Hammond* had not received but 500 l. But he ought to have pleaded by way of positive Allegation, and not by a *bene & verum est* &c. that *Hamond* had received 500 l. and given a true Account thereof; *absque hoc*, that he had received several Sums amounting to 7000 l. or more than the said 500 l. And of that Opinion was the whole Court, and Judgment was given for the Plaintiff. *Lutwyche* was of Council with the Plaintiff.

Langdon

* *Quare* if it should not be 559, 560:

Langdon *versus* Wallis.

Hill. 9 W. 3. Rot. 632. C. B.

THE Plaintiff declares, that in Mich. Term 2 W. & M. he, as Executor of one John Hill, obtained a Judgment in C. B. against J. Whittington, Executor of J. Whittington, for 180 l. Debt, and 11 l. 10 s. for Damages. That in Easter Term, 3 W. & M. Execution was awarded. That 12 June, 3 W. & M. a Capias satisfaciend' was sued out, &c. ret' Cro. Aiarum, which was delivered to Henry Wallis the Sheriff of Wilts on the 1st of July, 3 W. & M. and Whittington thereupon taken the 21st of the same Month, who then paid Wallis the Money. The Defendant pleads Non detinet, and Issue thereupon. On the Tryal the Jury brought in a Special Verdict, whereby they find the Judgment, and the Award of Execution, the suing out the Capias satisfaciend' and the Delivery thereof to the said Sheriff. That the 21st of July, 3 W. & M. one R. Constable, Under-Sheriff to the said Wallis, made a Warrant to certain Bayliffs to take the said Whittington, who was arrested thereon 22 July 3 W. & M. That Whittington assign'd a Mortgage to the Under-Sheriff, for securing the Payment of the said Debt, &c. and was thereupon set at Liberty. That after the said Sheriff Wallis was removed from his Office, Whittington paid to the said Under-Sheriff the Money recover'd, and the Under-Sheriff re-assigned to Whittington. Et si sup' tota materia &c.

fo. 582.

Debt against the Executrix of the Sheriff of Wilts for an Escape.

fo. 587.

A Sheriff can't discharge a Person taken on a Capias satisfaciend' tho' he gives Security, &c.

After two several Arguments in this Case, Judgment by the Opinion of the whole Court was given for the Defendant. And the main Reason thereof was, because the Under-

Under Sheriff's setting the Prisoner who was taken in Execution at liberty, on the said Security given him by way of Mortgage, was an Escape in the High Sheriff. And to prove that, it was said by the Defendant's Council, that the Sheriff hath no Authority by the *Ca' Sa'* to take this Mortgage, and thereupon to discharge the Prisoner, then it was an Escape. The Writ gives him no such Authority, but requires the contrary; for the Writ is *Quod capias &c. & eum salvo custodias, ita quod habeas corpus ejus* such a Day *ad satisfaciend'* the Plaintiff.

fo. 588.

And if the Sheriff had pursued his Authority, then he might have return'd such Matter in Excuse of himself for not having the Body at the Day of the Return of the Writ. But such Return was never seen nor heard. And without doubt if the Plaintiff in the original Action had brought his Action against the Sheriff for an Escape before the Payment of the Money to his Under Sheriff, the taking of the Mortgage by him had not been pleadable in Bar of that Action.

If the Plaintiff in the Original Action had sued out a new *Ca' Sa'* and the Defendant had been taken thereupon, he should not have any Remedy against it, and by Consequence there was an Escape; for if he was legally discharg'd, without doubt he might have Relief by *Audita Querela*. And the Case of *Stringar*, 3 Cro. 404. was cited, where it is held by *Fenner* and *Popham*, that if the Sheriff on a *Ca' Sa'* receives the Money, yet he can't discharge the Prisoner out of Execution. But *Gawdy* and *Clench* were of a contrary Opinion, which seems to be founded on the Books of 13 H. 7. 16 and 21 H. 7. 23. which were

were cited by them. But I can't find any thing in those Books tending to that Matter. And the Opinion of *Danby* in 33 H. 6. 48. is also there cited by them, where it is said that the taking of the Body in Execution is not any Satisfaction to the Plaintiff, but if he will satisfy, then there is no Reason that he should be imprisoned by the Writ; wherefore it may well be intended, that if he satisfies the Plaintiff in the Action before the Arrest, that then it would not be reasonable to arrest him.

And if so be there was an Action for an Escape once vested in the Plaintiff which is founded *ex Maleficio*, it can never be converted into an Action of Debt, which is founded on Contract, save only by the Power of an Act of Parliament; and therefore an Action of Debt for an Escape of one out of Execution is given by the Statute of R. the Second.

It was objected, that the Payment of the Money to the Under Sheriff was a Payment in Law to the High Sheriff. But to that it was answer'd, that that could not be; for the Payment was made when they were both out of Office, and when there was no Relation or Concern between them, and then it was all one as if it had been paid to a meer Stranger; and if it had been receiv'd during the Continuance in their Offices, yet for the Reasons before given the Under Sheriff had no Authority to discharge the Prisoner.

And as to the Case of *Speake* and *Richards*, *Hob.* 206. which was objected by the other side, it was said that that Case was not to be compared to the Case here; for in that Case

An Action founded *ex Maleficio* can't be converted into an Action of Debt; &c.

A Sheriff may receive the Money on a *Fi fa*

the Sheriff had Authority by his Writ to receive the Money ; for the Writ is, *Quod fieri fac' denar' de bonis & Catal' &c.* And in that Case, by the Receipt of the Money by the Sheriff, the Defendant is legally discharg'd and he may plead that, and the Action is transferred from the Defendant to the Sheriff. And that is the main Reason given in *Speake* and *Richards's* Case, and in *Perkinson* and *Gifford's* Case, *Cro. Car.* 539. But in the Case here, *eo instanti* that the Prisoner was set at Liberty, an Action of Debt for the Escape was vested in the Plaintiff, which was not nor could be divested by any subsequent Act without his Consent.

fo. 589.

And as to what was said on the other side that if an Executor takes a Bond from his Testator's Debtor in Satisfaction of the Debt that it is a good Discharge of the former Debt, and that by the same Reason it should be so in the Case here: It was answer'd by the Defendant's Council, that the Cases are not alike ; for in the first Case the Executor, by virtue of his Executorship, hath Interest in the Debt, and might have released and discharged the Debt without Satisfaction. But in the Case here, the Sheriff hath no Authority to take Security for the Plaintiff's Debt.

A Sheriff
can't detain
Goods taken
on a *Fieri fac'*
to his own
Use, tho' he
pays the Pl.
with his own
Money.

And the Law requires of Sheriffs a strict Execution and Observance of the King's Writs directed to them. And therefore it was adjudged in *Waller* and *Weedale's* Case, *Noy* 10 that if a Sheriff levies Goods on a *Fieri fac'* and after pays the Plaintiff with his own proper Money, yet he can't detain the Goods to his own proper Use, because his Authority is to sell the Goods. And for the same Reason it hath been also adjudged, that

Sheriff

Sheriff can't deliver the Goods by him taken in Excecution on a *Fieri fac'* to the Plaintiff in Satisfaction of his Debt, 3 Cro. 504. *Thompson and Clerke's Case*; 2 *Ventr.* 93. *Bealy and Sampson's Case*. On the part of the Defendant these Cases were cited, 3 Cro. 208. *Rooke and Wilmot's Case*; 2 *Mod. Rep.* 214. *Taylor and Baker's Case*; 2 Cro. 514. *Sly and Finch's Case*; 2 Cro. 73. *Ayre v. Ayden*. In which Case, as it is reported by Cro. it is resolved, that the Sheriff after he is out of Office may sell Goods by virtue of a *Fieri fac'* But that Case is reported in *Yelv.* 44. to the contrary. And the Case, as it was reported in *Croke*, was deny'd to be Law by the Chief Justice and *Powel* Justice. Many other Cases were cited, which were not directly to the Point of the Case here, and therefore I omit them. Gould the King's Serjeant, and *Birch*, were of Council with the Plaintiff, and *Wright* the King's Serjeant, and *Lutwyche*, with the Defendant.

Keating *versus* Irish.

Pasch. 9 *W.* 3. *Rot.* 366.

DEBT on Bond given by the Tenant at Will to his Lessor, with Condition to give Notice to the Lessor of all Declarations, &c. delivered to the Tenant or others with his Privy, to pay his Rent, not to attorn Tenant to any other without the Consent of the Lessor, &c. not to suffer Judgment in Ejectment, &c. and on reasonable Request to deliver Possession of all Lands which he then held, or then after should hold, and in the mean time to preserve the Woods. Bar, that he held five Closets

fo. 590.
Debt ori
Bond.

(naming them) of the Plaintiff at Will, at the yearly Rent of 11 l. &c. That 5 l. 10 s. for half Year's Rent, due and ending at such a Feast, were in Arrear, which he tendered on the Premises, but the Plaintiff, &c. was not there to receive the same. That such a Day he tender'd them to the Plaintiff, &c. Et profert &c. That before any other Rent was due, scil' &c. the Plaintiff enter'd, &c. That after the Bond, &c. he did not attorn sine consensu &c. nor suffer'd any Judgments, &c. And to the rest pleads Performance generally. To which the Plaintiff demurs, for that the Plea doth not answer to the several Particulars in the Condition, ac par inde est negativa prægnans; and the Defendant joins in Demurrer.

fo. 593.

Lessee is bound to give Notice of all Declarations, general Performance is a good Plea.

These Exceptions were taken to this Plea

1. That by the Condition the Defendant was to give Notice to the Plaintiff of all Declarations which should be deliver'd to him, and then general Performance is no Plea, but he ought to plead, either that no Declaration was deliver'd, or that such were deliver'd, and that he had given Notice thereof.

2. That it was not aver'd, that the five Closes mentioned in the Defendant's Plea were all the Closes which the Defendant held of the Plaintiff.

Not to attorn without Consent, *quod non attornavit sine, &c.* is good.

3. That he hath pleaded *quod non attornavit sine consensu Querent'* which is a mere Negative pregnant, 2 Cro. 559. Keil. 95. b. But they were all over-rul'd and Judgment given for the Defendant.

To prove that general Performance might be pleaded, these Cases were cited, 41 E. 3. 10. b. 2 R. 3. 17. a. b. 22 E. 4. 15. a. 6 H. 7. 17. a. 1 Inst. 303. b. 3 Cro. 307. 749. Mo. 856. 2 Saun. 411.

Note

Note, A special Case for avoiding Prolixity in Pleading, which was the chief Reason of the Judgment. It was also held by the Court, that the Tender on the Land was not well pleaded, because it is not shewn that it was made in convenient time before Sun-set, *Cro. 423. 499.* But that was cured by the pleading of a Tender to the Person of the Plaintiff after it. *Wright* the King's Serjeant for the Defendant, and *Girdler* for the Plaintiff. *Lutwyche* was retained for the Defendant, but Judgment was given for him on the first Argument.

Tender on the Land without shewing when, is ill but cur'd by pleading a Tender to the Person after.

Knife *versus* Hobart.

Mich. 10 W. 3. Rot. 331. C. B.

[N Debt on Bond made to the Plaintiff by the Name of Bayliff of the Liberty of the Dean and Chapter of Westminster. The Defendant crav'd Oyer of the Condition, which recited, that the Plaintiff had received a Warrant from the Sheriff of Middl' on a Fieri fac' and that by virtue thereof he had levied certain Goods, as the Goods of one Kunningham, at the Suit of T. Story and his Wife, to the Value of 80 l. And also recited, that the superobligat' Christopher' Whiteman laid claim to the Goods, and that thereupon the Plaintiff, at the Request of the said C. W. had deliver'd them to him, &c. Si igitur the said C. W. deliver the Goods to the Plaintiff, if on a Tryal they should be found to be the Goods of Kunningham, and if the said C. W. and the Defendant should save the Plaintiff harmless, by reason of the quitting the possession of the Goods, and returning nulla bona &c. tunc &c. The Defendant pleaded non

fo. 593.

dampnificat' The Plaintiff replied, that Story and his Wife, Mich. 9 W. 3. obtained a Judgment against the said Kunningham for 40 l. Debt, and 11 l. 10 s. for Costs. That a Testat' fieri fac' issued the same Term, directed to the Sheriff of Middl' and ret' Octab' Hill' who thereupon made a Warrant to the Bayliff of the Liberty, who took the Goods in Execution. That the said C. W. claimed the Goods, which were delivered to him, and thereupon nulla bona return'd by the Plaintiff. That the Plaintiff was sued for it by the said Story and his Wife, and that he pleaded not guilty, and thereupon a Verdict and Judgment was had against the Plaintiff. And then concludes with Averment of the Identities. Demurrer and Joinder in Demurrer.

fo. 596.

For the Defendant it was insisted that the Bond was against Law, because it was to save the Plaintiff harmless from a false Return. But on the other side it was insisted, that the Bond was Legal, and to prove that these Authorities were cited, 1 Inst. 206. b. 10 Co. *Beawfage's Case*; Hob. Sir Daniel Norton's Case; Plow. Dive and Manningham's Case 1 And. 267. 3 Cro. 199. 2 H. 4. 9. 2 Cro. 199. And by the Opinion of the whole Court Judgment was pronounced for the Plaintiff but after Leave was given to argue the Case again, and so it was, but the Court adhered to their former Opinion. But on the Defendant's Offer to pay what the Plaintiff was dampnified, Execution was stay'd, and referred to the Prothonotary to compute, &c.

Denton *versus* Evans.

Mich. 11 W. 3. Rot. 454. C. B.

DEBT on Judgment in the King's Bench. fo. 600.
 The Defendant pleads in Abatement that a Debt on a
 Writ of Error was brought on this Judgment in Judgment in
 the Exchequer, & adhuc pendet indeterminat' B. R.
 prout &c. Et hoc, &c. unde per' Judic' de
 brev' To which Plea the Plaintiff demurs.

An Exception was taken to the Matter of fo. 602.
 the Plea, viz. that a Writ of Error depend- Debt may
 ing hinders not the Party from bringing be brought
 Debt on the Judgment. And for an Autho- on a Judg-
 rity, 1 Sid. 236. Adamson and Tomlinson's Case ment in B. R.
 was cited; and that Case gives this Rea- notwithstanding a
 son, viz. because the Record it self remains Writ of Er-
 in B. R. and only a Transcript is sent into ror in Camera
 the Exchequer Chamber. Scaccar'.

On the other side it was said, that there is the same Reason that a Writ of Error should be a *Supersedeas* to Debt on Judgment as to Execution on the Judgment. But the Court (the Chief Justice absent) awarded a *Respondens ouster*; for (as *Powel* Justice said) this Action hath been allowed ever since the Reign of H. 6. And sometimes this Plea hath been pleaded in Abatement, and sometimes in *Retardatione*, &c. of the Suit; but it could not be made good, because there could not be any certain Time for the Return of the Summons of the Party when the Judgment should be affirmed, as there is in the Case of a Protection.

Note, that in Mich. 9 W. 3. in C. B. inter *Haldred* and *Hawering*, such Plea was adjudg'd ill, because it concluded per' *Judicium de brev'*

vi' &c. But in this Case the Court did not resolve whether the Matter of the Plea was good, or no, or what Conclusion ought to be made in this Case.

Butterfield *versus* Marshall.

Hill. 13 W. 3. Rot. 1564. C. B.

fo. 603.
Debt on
Bond against
the Defen-
dant as Son
and Heir.

DEBT on Bond to perform Covenants in a Deed of Bargain and Sale. The Defendant sets forth the Indenture which was made between W. M. the Defendant's Father, and the Plaintiff; whereby Testatum existit, that the said W. M. had given, granted, &c. to the Plaintiff and his Heirs one Messuage, &c. and also Ingress' &c. from the Gate-house to a Well adjoining, &c. to draw Water for his necessary Occasions. Except' &c. Habend' &c. that W. M. covenanted to warrant the Premisses against himself and his Heirs. That he was seised in Fee of the said Messuage and Premisses, &c. and on this Covenant the Breach in the Replication is assign'd. That he had full Power, &c. That the Plaintiff should quietly enjoy, &c. without any Legal Impediment from him, &c. and also acquitted and discharged, &c. from all Bargains, &c. made by him, &c. the Rents due to the Chief Lord excepted. That he at the Costs of the Plaintiff, &c. would make all other Assurances, whether by Fine, Feoffment, Recovery, &c. or by all or any of them, or by any other Means as the Plaintiff, &c. should devise. That all prior Fines, &c. should be to the Use of the Plaintiff, &c. That on reasonable Request he would produce, &c. in any Court, &c. all Evidences concerning the Premisses; and then pleads Performance generally. The Plaintiff replies, that W. M. was

not

not seised in Fee of the said Well, as the Defendant by his Plea had alledg'd. Et hoc pet' &c. Demurrer and Joinder in Demurrer.

One Exception was taken by the Defendant's Council to the Replication, because the Plaintiff had assign'd a Breach that *W. M.* at the time of sealing, &c. of the said Indenture, was not seised in Fee of the said Well, whereas there was no Covenant in the Indenture that he was seised in Fee thereof. And of that Opinion was the whole Court, and by Consequence (altho' it was not expressly said by the Court) that the second Covenant, by which he covenanted that he was seised in Fee *de Messuagio & Premissis*, did not extend to the first, and that therefore the Replication was not good. But it was said by *Powel* Justice, that the Plaintiff ought to have alledg'd that *W. M.* had no Power to grant the said Liberty of drawing Water out of the Well.

fo. 608.

B. conveys a Messuage, &c. to *C.* and grants him liberty of Ingress, &c. to a Well; a Covenant that he is seised in Fee of the Premises don't extend to the Well.

But then an Exception was taken to the Plea that it was not good, for there is a Covenant in the Indenture for *quiet Enjoyment* without Interruption, &c. from any Person claiming under *W. M.* &c. *Ac etiam exonerat' acquietat' &c. de & ab omnibus incumbranciis &c.* And to such Covenant the Plea of Performance generally is not good; but the Defendant ought to have pleaded that the Lands at the time of the Conveyance, were not incumbered in any Manner. But the Plea, as it is now, is *tantamount* in Effect; as if he had said, that he had discharged the Lands from all Incumbrances, which had been ill. In Debt on Bond with Condition that if the Plaintiff shall enjoy such Lands discharged, or otherwise indemnified from all Incumbrances,

If one covenants that the Vendee shall enjoy Land without Interruption, and also discharg'd of Incumbrances, general Performance is a good Plea.

brances, then, &c. the Defendant pleaded that the Plaintiff had enjoy'd the Lands discharg'd from all Incumbrances. And on Demurrer it was adjudg'd that the Plea was ill, because he ought to have shewn how. And the Plea in this Case is all one in Effect.

fo. 609.
General Performance is a good Plea to a Covenant for further Assurance by Fine, Feoffment, &c.

And moreover it was objected, that the Plea was not good, in respect of the Covenant for further Assurance, for it is that he would make all other Assurances, either by *Fine, Feoffment, Recovery*, or by all or any of them, or by other Means which should be advised or required by the Plaintiff or his Council: And to that Covenant he ought to have pleaded, either that no further Assurance was devised and required, or that such Assurance was devised and required, and no other; and that he had executed that which was devised and required. And it is commonly pleaded in the Books, *Quod Consilium non dedit Advisament'*, which is a Proof that Performance generally is no Plea. This Plea in Effect is as if he had said in Words at large, that he had made all further Assurances, either by *Fine, Feoffment, &c.* which were advised and required, which had been strange. And moreover these two Exceptions are proved by the Precedents in *Co. Ent.* 65. *b* and *c.* 135. *b* and *c.* 147. *a. b* and *c.* 244, 245. and 635. *a* and *b.* which were cited by the Plaintiff's Council.

Tho' special Performance is better.

2 Co. 4. a. Cro.
El. 253. pl. 24.
Cro. Ja. 363.

But the Court was of Opinion that the Plea was good in Substance, tho' it was not the best sort of Pleading, as was said by *Powel Justice*, who also said, that the best Way of pleading Performance of Covenants for further Assurance was, as is before objected; and

and he cited these Cases to maintain the Plea, viz. Cro. Car. 76. *Chapman's Case*. 2 Cro. 281. *Briscoe and King's Case*, 2 Mod. Rep. 36. *Vide* these Cases and *nota*. And to that Purpose *Lib. Placitandi* 193. and 3 Cro. 749.

But at last the Chief Justice said, that admitting that the Bar was not good, yet inasmuch as it appears that the Plaintiff by his own shewing hath not any Cause of Action, he can't have Judgment; and so was the Opinion of the whole Court. But the Plaintiff had Leave to discontinue. *Lutwyche* and *Hall of Council* with the Plaintiff, *Cartbew* for the Defendant.

If the Plaintiff doth not assign a good Breach, he shall not have Judgment tho' the Bar is ill.

Rud versus Lowen.

Hill. 12 W. 3. Rot. 367. C. B.

Action of Debt against the Defendant as Executor of H. Taylor for 18 l. 4 s. 6 d. The Plaintiff declared, that H. Taylor, 27 Mar. 1693. per quamdam billam &c. acknowledg'd to owe the Plaintiff 9 l. 2 s. 3 d. solvend' &c. on the 29th of June next, ad quam quidem Solution' he bound himself, &c. in 18 l. 4 s. 6 d. præd' tamen H. Taylor in vita sua, and the said Defendant after his Death præd' 18 l. 4 s. 6 d. non solvit. The Defendant pleaded plene administravit, and Issue thereupon.

fo. 612.

Debt on a Bill penal against an Executor.

After Verdict for the Plaintiff, and several Motions in Arrest of Judgment, the Judgment was arrested, because in the Declaration it was only alledg'd, that the penal Sum in the Bill penal was not paid, and not that the 9 l. 2 s. 3 d. were not paid. *Fa. Selby* for the Defendant, *Lutwyche* for the Plaintiff.

fo. 613.

Cro. Car. 515.

Treene

Treene *versus* Hiccox.

Mich. 13 W. 3. Rot. 574. C. B.

fo. 614.
Debt on
Bond.

DEBT on Bond, dated 26 March, 3 Ja. 2. condition'd for the Payment of 15 l. 9 s. on 29 September next following. Bar, by the Act of Composition between Debtors and their Creditors made 1696. whereby it is enacted, That two Third parts, &c. of the Creditors may make Agreement with the Debtors who had absconded, or were Prisoners for Debt before 17 Nov. 1696. and that every such Agreement being made for the equal Benefit, &c. and subscribed and sealed by two Third parts, &c. without any secret Agreement for any greater Advantage, &c. should conclude all the other Creditors, &c. The Defendant confesses the Plaintiff's Bond; but saith, that on and before 17 Novemb. he was indebted to diverse Persons in several Sums particularly mention'd, and avers that the said Debts were all the Debts which he ow'd at any of the said Times; that he absconded for Debt before the said 17 November; that a Composition was made 1 May 1697. to accept 10 s. in the Pound; Ita quod it was paid within Seven Months, avers that the Composition was made for the equal Benefit of all his Creditors, and that he had paid the other Creditors according to the Composition; that the Plaintiff had Notice of the Composition; that he tender'd the Composition-Money, &c. to the Plaintiff, which she refused to accept; that he was touts temps prist, &c. and tenders the Money in Court unde petit Judic' si præd' Sara Actionem &c. Demurrer and Joinder in Demurrer.

fo. 618.

These Exceptions were taken to the Bar.

I. That

1. That the Beginning of the Plea, and also the Conclusion thereof, being with a Demand of Judgment, *si Actionem &c.* was ill.

2. That it was not alledg'd that the Composition was made in the time of the King, but only in *Anno Dom' &c.*

3. That it was said that the Defendant absconded before the 17th Day of *November* before the Act, whereas it ought to have been aver'd that he absconded on that Day.

4. That he ought to aver that the Debts mentioned in the Plea, were all the Debts which he owed at the time of the making of the Composition.

5. That the Composition was, that some of the Creditors should have *10 s. per lib.* for their principal Debts, and also for the Interest due thereon, and some of them were to have the said *10 s. per lib.* for their principal Debts only; and by the Act the Composition is to be made for the equal Benefit of all the Creditors.

6. That the Venue is laid at *Warwick*, and the Defendant hath pleaded transitory Matter in Bar, and hath alledged it to be made at *Rugby* in the County of *Warwick*, and he can't alter the Venue by pleading transitory Things in Bar.

The Court (as I thought) was of Opinion that the Bar was good, notwithstanding all the said Exceptions save the last. And altho' it was insisted by the Defendant's Council, that *Warwick* was in the Margent of the Declaration, which is to be intended the County of *Warwick*, and the Declaration is that the Bond was made at *Warwick*, which shall refer to *Warwick* in the Margent; yet Judgment

ment was given for the Plaintiff, and it was declared by the Court, that Judgment was given for that last Exception only. Carthew was of Council for the Plaintiff, Lutwyche for the Defendant.

Prynce versus Crompton.

Mich. 12 W. 3. Rot. 349. C. B.

fo. 619.
Debt by an
Administra-
trix.

DE BT by the *Administratrix* of F. Prince, on a Bond Conditioned for the Appearance of G. L. die Martis prox' post tres Mich' ad respondend' W. C. Bar by the Statute of 23 H. 6. and that W. C. in Trinity Term, 6 W. & M. sued out of the King's Bench a Latitat against one G. L. ret' die Lunæ prox' post tres Mich. for 10 l. Prætextu cujus Brevis the Intestate arrested G. L. and thereupon the Defendant with others sealed, &c. the Bond in the Declaration, &c. Replic' that in Trinity Term, 6 W. & M. the said W. C. sued out of the King's Bench a Latitat against the said G. L. ret' die Martis post tres Mich. and that the Intestate by virtue of the said Writ took the said G. L. and thereupon the Bond in the Declaration was given. That at the time of the making the said Bond, the said G. L. was in the Intestate's Custody by virtue of the said last Writ. The Defendant demurs, because it doth not appear by the Replication, that the Sheriff could take G. L. by virtue of the Latitat in the Replication mention'd, and because the Plaintiff traverses Matter not traversable.

fo. 622.

The Court resolved, that the Writ and Declaration in this Case were ill, because Francis Prynce, to whom the Plaintiff is *Administratrix*, was not named therein nup' Vic

Com

Com' Salop'. Lutwyche was of Council with the Plaintiff. *Vide* the Case between *Blewett & al' v. Appleby*, *postea* Pag.

Brinly versus Burgh & al'.

Trin. 13 W. 3. Rot. 1457. C. B.

THE Plaintiff declares, that Sir J. H. deceas'd, on the 8th of March 1668. became bound to the Intestate in 200 l. That the said Sir J. H. 3 Novemb' 1695. was seised in Fee of divers Lands, &c. in Bermudas, and being so seised, did, to defraud his Creditors, covenant with the Defendants to stand seised of the said Lands, &c. to the Use of A. Bridges in Tail General, Remainder to his own right Heirs. That the Plaintiff's Father died 1 May 1694. and Administration granted, &c. to the Plaintiff 30 March 1699. That a private Act of Parliament was made 13 Novemb' 1699. whereby it was enacted, that the Lands, &c. should be vested in the Defendants and their Heirs in Trust, to sell them to such Purchaser as Dame A. Boughton should approve, and if she died, to the best Purchaser that could be had; and that the Money should be put out at Interest, &c. and paid to the said A. Bridges at her Age of 21. Proviso, that the Act should not deprive the Administrators of R. B. the Intestate, of any Benefit which they then had to charge the said Lands to satisfy the said Bond, but that the Trustees should pay the said Debt when recover'd, &c. That the Trustees sold the Lands, &c. according to the Act, for a Sum above 200 l. Avers that the Debt is not satisfied, and that the Lands were subject to the Payment of the said Debt, forasmuch as the said Conveyance was frau-

fo. 623.
Debt for
200 l. by an
Administra-
tor.

fraudulent, &c. Demurrer and Joinder in Demurrer.

fo. 616.

Judgment for the Defendant, because the Matter contain'd in the Declaration was only Matter of Trust, and meerly proper for a Court of Equity, in which Suit the said *Ann Bridges* ought to be a Party. But nothing was said by the Court expresly, whether the Lands were in the Nature of personal Affets, &c. or not. And *vide* for that *Noel and Robinson's Case*, 2 *Ventr.* 358. which was cited in this Case, to prove that the Lands here were as personal Affets, &c. *Lutwyche* was of Council with the Plaintiff.

Beale & Ux' versus Simpson.

Hill. 9 W. 3. Rot. 321. C. B.

fo. 627.
Debt for
203 l. 10 s. on
an Escape of
R. D. out of
Execution.

DEBT against the Bayliff of a Liberty by Beale and his Wife, Administratrix of J. Stanhope, during the Minority of M. S. and H. S. Daughters and Residuary Legatees of the said J. S. with the Will annex for the Escape of R. Dickins out of Execution, on a Judgment obtain'd by the Plaintiffs, the Escape being alledged to be 3 Feb. 8 W. 3. Bar, that before the Escape, scil' 23 Jan' 8 W. 3. an Habeas Corp' issued, directed to him, retornable Craft' Purific' and that by virtue of the said Writ he had the Body of the said D. at the Retorn, &c. and that D. was thereupon committed, &c. Replic' that 28 Novemb' 8 W. 3. an Habeas Corp' retornable Octab' Hill' was directed to the Defendant, &c. and that after the Retorn thereof, by Colour of the said Writ, he took the said D. out of Goal, and brought him to Westminster 6 Feb' &c. and the same Day by Fraud the said

said Habeas Corp' in the Bar was sued out, and then delivered to the Defendant, and that by virtue thereof, the said D. was brought to Westminster, and committed to the Fleet the same Day. Absq; hoc that D. was taken out of Prison, and brought to Westminster by virtue of the Habeas Corp' in the Bar. To this the Defendant demurs, for that the Traverse is repugnant, and traverses Matter not traversable.

One Exception was taken to the Declaration, because it was not averr'd that the Infants were within the Age of 17 Years, but generally within Age: *Sed non allocatur*, for the Defendant by his Plea hath admitted the Authority of the Plaintiffs to bring the Action.

fo. 632.
Where a Declaration shall be made good by the Bar.

But the chief Exception was, that the *virtute cujus*, &c. was travers'd by the Plaintiff in the Replication, which, as was alledg'd, was Matter of Law; and therefore the Traverse is ill. And so was the Opinion of the Chief Justice; but the three other Judges were of a contrary Opinion, and thereupon the Plaintiff had Judgment. Gould the King's Serjeant, now one of the Judges of the King's Bench; Wright the King's Serjeant, late Lord Keeper of the Great Seal, and Lutwyche of Council with the Defendant; Levinz and Wiat for the Plaintiff.

H. Royston, Executor of S. Royston, *versus* Baston or Barton.

Trin. 11 W. 3. Rot. 1896.

IN Debt on a Bond made to the Testator, the Defendant after reciting the Act made 20 Octob.

fo. 633.
Debt on Bond.

R

8 W.

8 W. 3. pleads that before the said 17 November, in the said Act mention'd scil' &c. he was unable to pay his Debts and absconded; that he was indebted to several Persons, naming them, &c. who with the said H. were all his real Creditors; and being so indebted, two Third Parts in Number and Value scil' &c. ante diem exhibitionis billæ, &c. compounded to take 1 s. per Pound, and gave him 3 Years to pay it, &c. de quo quidem scripto, &c. The Plaintiff had Notice, and was desired, but refused to seal it, ratione quorum quidem Premissorum the Plaintiff ought not to sue him till the End of the 3 Years. Et hoc &c. unde pet' Judic' si Actionem &c. Demurrer and Joinder in Demurrer.

fo. 634.

Judgment was given for the Plaintiff because it was said, that the Composition was made *postea & antea exhibitionem billæ*, whereas it ought to have been *ante Impetrationem brevis Originalis*.

Buxton versus Nolson.

Hill. 11 W. 3. Rot. 1751. C. B.

fo. 639.
Debt on
Bond.

IN Debt on Bond, the Defendant after reciting the Statute made Anno 7 W. 3. concerning Composition to be made by Creditors with their Debtors, pleads, That the 1st of October, 1696. he was indebted in the several Sums and to the several Persons under mentioned, &c. That he was unable to pay, &c. and therefore absconded. That the 10th of June 1697. two third Parts of his Creditors in Number and Value, by Agreement produced in Court under their Hands and Seals, compounded and agreed with him to accept 1 s. per Pound, &c. and so for a greater or less Sum; virtute

ante ejus &c. exonerat' esse debet against the Plaintiff. And avers that the Composition was made for the equal Benefit, &c. Demurrer and Joinder in Demurrer.

fo. 638.

These Exceptions were taken to this Plea.

1. That the Defendant ought to have pleaded, that he had given the Plaintiff Notice of the Composition.

2. That he ought to have made a Tender in Court of the Money to be paid to the Plaintiff by the Composition.

3. That the said Composition ought to have been pleaded as a Release. *Trin. 12 W. 3.* Judgment was given for the Plaintiff for the two first Exceptions: And thereupon it was said by *Powel* Justice, that the Court did not determine how this Matter was to be pleaded. And *Treby* Chief Justice said, that a Release on Condition that the Releasee should pay to the Releasor so much Money, is not good; but if a Release be so made, that if the Releasee shall pay so much at such a Day to come, then he releases, &c. that is a good Release. *Vide* for that *21 H. 7. 23.* and *21 H. 7. 30.* & *Nota.*

A Release on Condition subsequent is ill, *aliter* on Condition precedent:

Camfield versus Warren.

Pasch. 12 W. 3.

IN an Action of Debt brought in C. B. the Defendant pleaded his Privilege as an Attorney B. R. To which the Plaintiff demurr'd.

fo. 639.

Judgment quod respondeat Ouster, for the Reason given in *Barrington's Case.* *Hardres* 164. *Lewinston* and *Crompton's Case.* *Stiles* 359.

R 2

Newis

Nevis and Nelson's Case, 1 *Keb.* 256. *vid.* the *Case of Wentworth and Squib*, *antea* p. 20.

Wentworth versus Squib.

Pasch. 13 W. 3. C. B. { *Pas. ult' preterit' Rot.* 44
 { *Hill. ult' preterit' Rot.* 67

fo. 640.
 Debt on
 Bond and al-
 so on a Judg-
 ment.

THE Plaintiff declares on Bond for 100 l. and also on a Judgment in C. B. for 100 l. Debt and 50 s. Costs. The Defendant as to the Debt on Bond saith, that in Easter-Term, 10 W. 3. the Plaintiff had Judgment for the said Debt, & prout &c. and as to the said 102 l. 10 s. saith that after the said Judgment the Plaintiff in Easter-Term, 11 W. 3. sued out a Ca' sa' on the said Judgment against the Defendant, directed the Sheriffs of London; which Writ was delivered, &c. and the Defendant by virtue thereof taken in Execution, and 20 June paid the Plaintiff the said Debt and Damages. The Plaintiff demurred to the first Plea, and to the other replies, that the Sheriffs of London did not take the Defendant in Execution, &c. Et hoc petit &c. The Defendant joins in Demurrer to the first Plea, and demurs to the Replication.

fo. 643.
 Payment
 can't be plea-
 ded in Bar of
 a Judgment.

The Opinion of the whole Court was, that Payment, as this Case is, was not a good Plea in Avoidance of the Judgment, and therefore the Plaintiff had Judgment. The Cases cited for the Plaintiff on the Argument, were *Cro. Car.* 328. *Vesby and Harri* Case, 2 *Cro.* 29. *Ognel and Randall's Case*, 1 *Keb.* 212.

Letten *versus* Winne.

Mich. 9 W. 3. Rot. 436. C. B.

DEbt for Rent by an Execut' of an Assignee against the Assignee of the Lease, yielding 16 l. at the four usual Feasts, and two Turkeys of the Value of 10 s. or 10 s. in Discharge thereof, at the Election of the Lessor, &c. 64 l. Rent, arrear, for four Years ending at Christmas 8 W. 3. and 90 s. for eighteen Turkeys for nine Years, ending 1 Jan. 8 W. 3. After the Plaintiff elected, to have the Money in lieu of the Turkeys per quod Actio &c. Plea in Abatement by another Action depending as to 32 l. of the Rent for two Years ending at Lady-Day 7 W. 3. and also 3 l. 10 s. for the Turkeys for 7 Years, ending 1 Jan. 6 W. 3. and as to the Residue of the Rent, the Defendant demurs to the Declaration. Replic' to the Plea in Abatement by nul tiel Record. Joinder in Demurrer as to the Residue. Rejoind', quod habetur tale Record' &c.

fo. 643:
Debt for Rent by the Executor of an Assignee against the Assignee of the Lease.

After failure of the said Record, these Exceptions were taken to the Declaration.

fo. 655.

1. That by the Declaration it is only said, that the said William Angell was possessed de Tenement' præd', whereas his Title ought to be shewn, *sed non allocatur*; see for that 1 Sid. 218. Bickerstaff's Case.

Possessionat' without shewing his Title, good.

2. That the Allegation that the Rent for the Turkeys became due to the Plaintiff post Electionem ipsius Susanne ad eisdem denar', sibi in Exoneration' Meleagrid' habend' & notic' inde per eund' Henric' habitam, was not sufficient, but ought to be expressly averr'd, that the Plaintiff such a Day and Year had made his Election, &c. and had given Notice thereof to the Defendant; *sed non allocatur*; for it is

Post Election' without shewing when he made his Election, yet good.

sufficient, altho' it is not so formal as it might be. But *Quære* in what manner Issue should be taken by the Defendant, if no Election or no Notice had been given; and for that *vide* 1 Mod. Rep. 217. Ingram's Case, Et nota bene. But it was said by *Powel* Justice, that one or t'other ought to be tender'd by the Def. and that the bringing of the Action is an Election. *Lutwyche* of Council with the Plaintiff. And the Plaintiff had Judgment for his whole Demand.

Robinson *versus* Corbett.

Trin. 11 W. 3. Rot. 1628. C. B.

fo. 656.
Debt against
an Executrix.

DEBT against an Executrix on Bond made by the Testator, 14 May, 8 W. 3. Bar, that after the Death of her Testator one William Wife in Easter-Term, 9 W. 3. brought a Bill against her as Execut' &c. in a Plea of Debt, on which he declar'd on Bond of 200 l. made by the Testator and obtained Judgment against her by non sum informat' for the said Debt and 31 s. for Damages, prout &c. that the said Debt was a true Debt, &c. and that there was a like Judgment against her in the same Term at the Suit of Valentine Houseman and George Shaw for 298 l. 18 s. Debt, and 36 s. for Costs; that the same was a just Debt. And then the Defendant pleads plene administravit &c. except Goods to the Value of 20 l. &c. and avers the Identities. Replic', that the said Judgment obtain'd by the said Wife was obtain'd by Fraud, &c. and the same as to the said Judgment obtain'd by Houseman and Shaw. The Defendant rejoins, and protesting that the Replication is insufficient, says that the Judgment obtain'd by Wife was for a just Debt, &c. and the same

same as to the other Judgment. The Plaintiff demurs for that the Protestation in the Rejoinder is repugnant to the Matter in the Rejoinder pleaded, and ought to have been left out.

The Exception mention'd in the Demurrer, viz. that the Protestation in the Rejoinder is repugnant to the Matter thereof, was waved, and one single Exception was taken by Levinz of Council with the Plaintiff, viz. That the Defendant in her Bar ought to have alledg'd in Fact, that her Testator had made the Bond, and that it was not sufficient that it was alledg'd in the Count on which the Judgment was obtained; that the Testator *per scriptum suum obligatorium concessit &c.* for that is not traversable, and it can't be travers'd that the Debt recover'd *fuit iustum & verum Debitum*: but if the making of the Bond had been alledg'd, then it might have been pleaded to it, that there was never such Bond; and he cited *Sid. 230. Brown and Purchase's Case*, to that purpose 1 *Brownl.* 49. 1 *Saund.* 328. *Cro. El.* 462. But to that the Defendant's Council answer'd, that there was no need to alledge in the Plea that the Testator was bound *per scriptum obligatorium*, and so it is adjudg'd in 1 *Keb.* 808. and so is *Co. Entr.* 149. where it is adjudged good on Demurrer, and there are other Precedents so, viz. *Co. Ent.* 269. *Browne's Entries*, 2 par. 88 and 96. *Lib. Placitandi* 149, 157, and 179. and of that Opinion was the whole Court. And it was said by the Chief Justice and *Powel Justice*, that none but the Party himself, his Heirs, Executors or Administrators, can plead *non est Factum*; and by *Powel Justice*, that the Plaintiff can't insist upon any thing except the Fraud, and that the Opinion in

fo. 662.

If an Executor pleads a Judgment, he need not shew that his Testat' made such Bond.

None can plead *non est factum* but the Party himself, his Heirs, &c.

1 Sid. 332. *Green and Wilcocks's Case*, Cro. El. (462.) had
 pl. 17. Cro. El. 471. been a long time exploded; and that there
 is no need to plead that Judgment was *pro ju-*
sto & vero debito; for it shall be so presum'd
prima facie. The Plaintiff had leave to dis-
 continue on Payment of Costs. *Lutwyche* of
 Council with the Defendant.

Ladd *versus* Garrod.

Pasch. 9 W. 3. Rot. 321. C. B.

fo. 663.
 Debt on
 Bond.

DEBT on Bond to pay to the Plaintiff 10 s. for
 every 20 s. which the Plaintiff by sufficient
 Proof should make appear to be due to him from
 J. Kingdon. Bar, that the Plaintiff had not made
 it appear that any Sum was due to him. Replic',
 that before the Day of Payment the Plaintiff and
 Kingdon accounted together, and Kingdon was
 found in Arrear, and confess'd himself indebted in
 310 l. Breach in Non-payment of 77 l. 10 s. &c.
 Demurrer and Joinder in Demurrer.

fo. 665.

In this Case it was objected by *Wright*, then
 the King's Serjeant, that Proof in this Case
 ought to be Proof on Tryal by Jury, which
 is the only Proof of which the Law takes
 Notice; and for that he cited 10 E. 4. 11.
 Cro. El. 305. *Scroggs v. Griffin*; 2 Cro. 232. 381.
 and 488. 1 Sid. 57. *Hob. 92.* 2 *Keb. 239.* And
 as to *Butcher and Vale's Case*, 1 Sid. 313. he
 said, that that was because there was other
 Proof appointed by the Parties.

fo. 666.
 In what Case
 Proof may be
 in the same
 Action.

Resp. To which the Plaintiff's Council an-
 swered, that the Parties, as this Case is,
 could not intend a Judicial Proof, for the
 Proof is to precede the first Payment of the
 Money; for the Bond bears Date 23 Aug.
 1693. and the first Payment is to be made

25 Novemb. following: So that there is but one Month and two Days in Term-time for the making thereof, and the Proof can't be made in so short a Time, and consequently some other Proof must be intended.

2. *Object.* But then it was objected, that the Confession of *Kingdon* was not sufficient, and also that he was not *Fide dignus*.

Resp. To which it was answered, that admitting that there had been sufficient Time for the Proof before the bringing of the Action, that could not be had against the Defendant; for the Plaintiff had no Cause of Action against him, but only on the Bond, and he could not have an Action thereupon before the Proof; and if it should be against *Kingdon*, his Confession of the Action, or Demurrer to the Declaration without good Cause, had been sufficient Evidence, as *Crookshay* and *Woodward's* Case, *Hob.* 217. is. And if so, no Reason can be given that his Confession on an Account should not be good Evidence. And as to the Competency of *Kingdon*, it is agreed, as appears by the Condition of the Bond, that Money was due to the Plaintiff by *Kingdon*; but the *Quantum* of the Debt was the only Matter in Controversy, and no Person sure more proper to ascertain it than *Kingdon*, on an Account with the Plaintiff: Nor was it material to *Kingdon* whether it was more or less, for the Defendant was bound to pay it; and it is to be presum'd that *Kingdon* would not do an Injury to the Defendant, who was so kind to him as to oblige himself to satisfy his Debt. And the Case of *Cockam* and *Goodlage*, 1 *Bul.* 40. is an Authority in Point, that the Proof is good. *Tota Cur' pro Quer' and Judgment given*

Bond to pay what J. owes to the Plaintiff; J's Confession on an Account is good Evidence.

given accordingly. *Lutwyche* of Council for the Plaintiff.

Briggs versus Mond.

Hill. 9 W. 3. C. B.

fo. 667.
Debt on
Bond.

DEBT on Bond to pay the Plaintiff 10 l. provided the Plaintiff should save T. S. harmless from all Costs, &c. by reason of the Plaintiff's being with Child. Bar, That the Plaintiff was examined before a Justice of the Peace, and swore that the said T. S. was the Father of the Child, whereon the said T. S. was taken, and brought before a Justice, and compelled to find Bail, &c. Replic' That 1 Aug. 8 W. 3. she was delivered of a Child, which was a Bastard, begot by the said T. S. That the said T. S. was not dampnified by reason of the Maintenance of the Child, or of the Plaintiff. Demurrer and Joinder in Demurrer.

fo. 669.
What will
make a Con-
dition against
Law, and
what not.

For the Plaintiff it was insisted, that the Intent of the Condition of the Bond was, that the poor Woman should have such small Sum of 10 l. to maintain her self and her Child, which, as appears, was the Bastard-Child of *Sheafe*, and that the Defendant should not be put to any further Charge for the Maintenance of them; but not to save him harmless against legal Prosecution, which was neither in the Plaintiff's nor Defendant's Power to prevent. And if the *Proviso* in the Condition of the Bond had been to such express purpose, it had been repugnant to the former part of the Condition, because against Law. And to that purpose was cited the Case of *Price and Phaner*, Mo. 477. *Dobson and Crew's Case*, Cro. El. 705. And of that Opinion

Opinion was the whole Court, and so Judgment was given for the Plaintiff. *Levinz* for the Defendant, *Lutwyche* for the Plaintiff.

Christopher Baron & William Baron,
Admin' of George Baron, versus Gervase Berkley.

Mich. 9 or 10 W. 3. Rot. 340. C. B.

IN Debt on a Devastavit, the Plaintiffs declare, fo. 670.
that in Trin. 9 W. 3. they obtain'd a Judgment in C. B. &c. against the Defendant and A. Debt on a Devastavit:
then his Wife, Executrix of J. That the Debt is yet Salk. 314. pl. 22. Cro. Car. 526.
unpaid, &c. That A. the Wife 1 Octob. 9 W. 3. died. That in Mich. following cons' fuit that they should have Execution against the Defendant. That no Execution was had; and then suggest a Devastavit in the Life-time of the Wife, per quod Actio &c. Demurrer and Joinder in Demurrer.

This Case was argued in *Mich. 9, and Hill. 10 W. 3.* by *Heath* both times for the Defendant, and first by *Girdler* and after by *Levinz* for the Plaintiff. And the only Question was, if the Action lay. *Heath* for the Defendant argued, that the Action did not lie. He agreed, that if a Devastavit had been returned on a *Testat' fieri facias*, and a Judgment had been had thereupon against *Baron* and *Feme*, that the *Baron* should be chargeable after the Death of the Wife. So if Judgment is had against *Baron* and *Feme* for the Debt of the *Feme*, and the *Feme* dieth, the *Baron* is liable, 1 *Sid. 337. Eyres v. Coward*: But it is other-

fo. 671.

fo. 672.

otherwise if the *Feme* dies before Judgment. And in this Case there is no Judgment on a *Devastavit* returned: Here is only a Suggestion that the *Baron* had wasted the Goods of the Testator in the Life of his Wife, which is not sufficient to charge the *Baron* after her Death. For in *Mounson* and *Bourne's* Case, 1 Cro. 519. it is said by *Jones* Justice, that if a Recovery is had against *Baron* and *Feme* on a *Devastavit*, if the *Baron* survives he shall be charg'd, and if the *Feme* survives him she shall be charged: But if the Recovery be not against *Baron* and *Feme* in the Life of the *Feme*, and she dieth, the *Baron* shall not be charg'd; and to that *Brampston* agreed.

The Case in Question differs from the Case of *Eyres* and *Coward*, 1 Sid. 337. and 2 Keb. 223, 225. and 235. for in that Case there was a Judgment against *Baron* and *Feme* on a *Devastavit* return'd.

In *Trotman* and *James's* Case, Mich. 9. C. 1. 1 Rolls Abr. 351. Nu. ult. it is left a Doubt if *Baron* shall be charged on a *Devastavit* returned, if the *Feme* dies before Judgment given against *Baron* and *Feme* on the *Devastavit*. And he said he had seen the Record of that Case, and no Judgment is enter'd. He said likewise, that he had a *M. S.* Report of his Father, who then was a Bencher of the *Middle-Temple*, in which it is reported, that it was resolved in the said Case of *Mounson* and *Bourne*, that if the *Feme* dies before Judgment on a *Devastavit* returned, that then there is no Remedy by the Law against the *Baron*, *a multo fortiori*, he shall not be charg'd where there is no *Devastavit* return'd.

To charge the *Baron* after the Death of *Feme* Executrix, on a meer Suggestion of a
Deva-

Devastavit in the Declaration, is a new Invention, and *primæ Impressionis*, and without any Precedent to warrant it.

The Case of *Wheatly and Lane*, 1 Saund. 216. and 1 Keb. 397. is not like to the Case in Question; for in that Case the Action was brought against the Executor himself on a *Devastavit* by him suggested in the Declaration: but in this Case the Defendant doth not continue Executor, but Administration *de bonis non &c.* is to be committed by the Ordinary to the next of Blood: So that the Baron, by the Death of his *Feme*, is as a meer Stranger to the Testator's Estate.

Another Reason (as he said) that the Baron shall not be chargeable in this Case was, because the wasting of the Goods was a *Tort*, and the *Devastavit* of the *Feme* Executrix; so that if the Baron had died before the *Feme*, she should be chargeable on that *Devastavit*; but she being the *Tort Feasor*, the Baron shall not be charged, because the *Tort moritur cum persona*. And for that he cited Co. 5. 73. b. Clifton's Case. 1 Inst. 54. a. where it is resolv'd, that Waste lieth not against the Husband after the Death of his Wife, for Waste done in the Life of his Wife, because he was seised only in the Right of his Wife and she was Tenant of the Freehold, and so in the principal Case the Wife was Executrix, and the *Devastavit* is the *Devastavit* of the Wife, and the Baron is only sueable for Conformity.

It would be a strange thing, that during the Coverture the wasting of the Goods by the Baron should be the *Devastavit* of the *Feme*, when the Baron hath relation to the Executorship *Jure Uxoris*; and that after the Death of the *Feme*, when the Baron by the Death

Death of the *Feme* hath lost that Relation, that the Wasting should be transferr'd from the *Feme* to the *Baron*, *Roll's Prohibit.* 302. nu. 22.

If an Executor *de Son Tort* had wasted the Goods of the Intestate, and died, by the Common Law his Executor was not chargeable. But now that is remedied by the Statute of 30 C. 2. cap. 7.

If a *Feme* Executrix takes Husband who wastes the Goods, and the *Feme* dies, by the Common Law there is no Remedy against the Baron by *Popham* and *Williams*, 1 *Roll's Abr.* 919. Lett' F. nu. 2.

So by the Common Law, Debt lies not against an Executor of an Executor on a Suggestion of a *Devastavit* by the former Executor, 1 *Vent.* 292.

On the other side, it was said, that the Word *Devastavit* was not in the Declaration, but the Words thereof are, that the Defendant *convertit & disposuit bona Testatoris ad usum suum proprium*. And if the *Feme* Lessee for Life yielding Rent takes Husband and dieth before the Husband, he shall be chargeable with the Arrears of Rent incurr'd in the Life of the *Feme*, 1 *Roll's Abr.* 351. Lett' G. nu. 1. So in the Case in Question, because the Defendant converted the Goods to his own proper Use, which should go to satisfy the Debts of the Testator, he shall be chargeable in this Action.

And the Cases of *Wheatley* and *Lane*, *Trotman* and *James*, and the Case of *Mounson* and *Bourne* before cited on the part of the Defendant, were cited on the part of the Plaintiff; and also the Case of *Cory* and *Thin*, 2 *Sid.* 102. (but reported there by the Name of *Cluther* and

and *Thin*) which is the same Case in Effect with *Wheatley* and *Lane's* Case, was cited on the part of the Plaintiff, and by them it was inferr'd, that the Averment in the Case in Question well lay to charge the Defendant.

And as to the Objection, that the *devastavit* was a Personal Tort, and *moritur cum persona*; it was answer'd, that in this Case the *Baron* and *Feme* were guilty of the Tort, and therefore the Survivor shall be charged. If *Baron* and *Feme* do a Trespass, an Action lieth against the *Baron* after the Death of the *Feme*; and so of *Detinue* and *Trover*. And to prove that the Wasting of the Goods in this Case was the Wasting of the *Baron*, it was said, that it was so adjudg'd in *King and Hilton's* Case, 1 Cro. 603.

Powel Justice. The Case of *Cory* and *Thin* was the first Case that brought an Averment of a *Devastavit*, in the Case of an Executor or Administrator himself: But this Case goes a Degree further, to charge the Defendant after the Death of *Feme* Executrix. But if the *Baron* after the Death of the *Feme* can't be charg'd on a *Devastavit* return'd in the Life of the *Feme* where she dieth before Judgment; *a fortiori*, he can't be charg'd in this Case, where the *Feme* died before any such Return. A *Devastavit* is a mere Tort, and is the Tort of the *Feme*. And I have heard the Lord *Hales* say, that he was of Council in the said Case of *Cory* and *Thin*, and that he had better Success therein than he expected, and that his Opinion was against that Case, and he wou'd not extend it further.

Treby Chief Justice. If we can give Remedy in this Case, I am ready to do it with a very good Will; shall all the Testator's Debts

fo. 674.

Debts be lost by the Defendant's having the good Fortune, that his Wife died before him? Without doubt there is Remedy in Equity.

Powel Justice. In *Clifton's Case*, Co. 5. 75. it is adjudg'd, that after the Death of the Wife, Tenant for Life, the *Baron* shall not be chargeable for Waste; altho' he himself did the *Tort*. *The Chief Justice.* The Reason thereof is, because it can't be said, that the *Baron tenuit ex dimissione*, according to the Words of the Statute.

Afterwards in *Trim. 11 W. 3.* Judgment by the Opinion of the whole Court was pronounced for the Defendant, *nisi causa ante clausum Terminum*. But before that *Levinz* moved, that he might have time till the next Term to argue the Case on the Equity of the Statute of 30 *Car. 2. Cap. 7.* which was readily granted him. But before that time the Defendant died, as I was informed by the said *Heath Serjeant*.

As to the principal Case here, *vide Ent and Withers's Case*, 1 *Ventr.* 321. *Brown and Collins's Case*, 2 *Lev.* 110. *Astry and Newil's Case*, 133. *Burrel and Richmond's Case*, *Carter* 2. *Sir Brian Tuck's Case*, 3 *Leon.* 241. in which Case it is resolv'd by all the Barons of the *Exchequer*, that the Executor of an Executor shall not be charged with a *Devastavit* made by the Executor of the first Testator, *imo* in the Case of the King, because it is a personal *Tort* only.

Plumer & al' versus Adams.

Hill. 12 W. 3.

IN Debt on Bond by the Plaintiffs as Executors of R. N. Barr, That the Plaintiff's Testator and the Defendant's other Creditors by their Deed licensed the Defendant to go, &c. without Impediment or Arrest for any Debt, &c. and in case of such Arrest they released him by the same Deed: Provided that the Defendant within two Months assigned and secured to the Use of the Creditors, all the Profits of the Tithes of the Rectory of S. prout per Concil' erudit' in Lege rationabil' advisat' vel devisat' foret. That according to the said Proviso, W. B. the Defendant's Council learned in the Law, advised a Letter of Attorney to be sealed by the Defendant, and to be delivered to V. H. to the Use of the Creditors, by which the Defendant appointed V. H. his Attorney to receive, &c. of one Humberstone, the Tenant of the Parsonage-House, &c. all Rents or Sums, &c. for Tithes of the Rectory, to the Use of the Creditors, and gave him Power to receive them, &c. and bound himself by the same Writing in 500 l. to the Creditors not to revoke the said Authority. That he had sealed the said Letter of Attorney, and delivered it to the said V. H. Et hoc &c. Unde pet' judic' si actio &c. To which the Plaintiff replies, that the said Writing supposed to be devised by the said W. B. is not a reasonable Assignment, but made by Covin, &c. and traverses that the said W. B. is a Counsellor at Law. The Defendant rejoins, that he was his Council at Law. The Plaintiff demurs, for that in taking Issue on the Traverse, the Defendant had added other Words which were not contained in the Traverse, scil' ipsius

fo. 675.
Debt on
Bond by Ex-
ecutors.

ipſius Johannis Adams, which pervert the Senſe thereof, and ought to have been entirely left out.

fo. 679.

These Exceptions were taken to the Defendant's Plea.

1. That the Letter of Attorney devised by the Defendant's Council, was not a sufficient and reasonable Assurance to the Creditors according to the Intent of the Composition-Deed : For thereby it is apparent, that it was the Intent of all the Parties, that the Creditors should have a sufficient Security for their Debts; or otherwise they were not oblig'd to defer Prosecution for the Recovery thereof, but for the Space of two Months. But this Letter of Attorney is not a sufficient Security to that purpose for the Reasons following.

1. Because the Security is by a Letter of Attorney, which is alway revocable at the Pleasure of him who made it, and the Clause of Forfeiture of 500 *l.* to the Creditors in Case of a Revocation of the Letter of Attorney inserted in it, is not material, because it doth not appear but that their Debts amounted to much more, and also because by the plain and express Meaning of the Composition Deed the Creditors were to have sufficient Security for the Satisfaction of their Debts out of the Profits of the Tythes, and not to rely on any other collateral Security. If *A.* covenants with *B.* to make him such Assurance of the Mannor of *D.* as the Council of *B.* shall advise; and the Council of *B.* gives Advice, that *A.* should be bound in a Bond that *B.* should enjoy the Mannor, *A.* is not oblig'd to seal it, because it is no Assurance with

the Intent of the Covenant, *Roll's Tit. Condition 423. nu. 1.* And moreover the Deed belongs to the Attorney, and the Creditors have no Means by Law to compel him to deliver it, so that they may sue thereupon: And for this Reason it hath been adjudg'd, that if one be bound to seal a Release to *J. S.* and he seals and delivers it to a Stranger to the Use of *J. S.* that is not any Performance, *Noy 18. 4 Leon. 122.* and other Cases.

2. Because by the exprefs Words of the Composition the Creditors Debts are to be secured and satisfied by and out of all the Profits of the said Tythes. But the Letter of Attorney is only to demand and receive to the Use of the Creditors, all the Rents and Profits which were due from *Thomas Humberstone*, the Defendant's Tenant of a Messuage called the *Parsonage-House*, and Tythes appertaining to the said Rectory. But it doth not appear that *Humberstone* was Tenant to the Defendant of all the Tythes belonging to the said Rectory; and the Words of the Plea are true, if he was Tenant but of part of the Tythes; and therefore he ought to have pleaded that *Humberstone* was Tenant of all the Tythes, &c. according to the Words of the *Proviso*; so that the Plaintiff might have taken Issue thereupon accordingly.

fo. 68o.

2. Admitting that the Security was good, yet the Defendant ought to have pleaded that he had given Notice to the Creditors what Advice was given by his Council, and that a Letter of Attorney was made in pursu-

ance thereof, and to whom it was made, and at what time; for otherwise it was impossible for them to know it. And for that the Case of *Royston and Barton* was cited which *Intrat' Trin. 11 W. 3. in C. B. Rot. 1896*. In which Case it was adjudg'd, that if one who is not a Party to a Composition-Deed according to the late Act of two Third parts in Number and Value, brings an Action for his Debt, that the Defendant ought to plead that he hath given Notice to the Plaintiff of the said Composition. *Vid. Co. 5. 19. b. Higginbottom's Case, and 3 Cro. 298. Stafford and Bortome's Case.* Judgment was given for the Plaintiff, because the Defendant had not pleaded that *Humberstone* had any, and what Title to all the Tithes, &c. And for that Reason only, without speaking to the other Matters.

Note, That the Security was to be made by the Advice of Council learned in the Law, without any mention of what Council whether of the Creditors, or of the Defendant; but on the Argument of the Case that was not insisted on: Yet *vide* for that the Case of *Hayward and Suppye, 3 Mod. Rep. 191.* *Lutwyche* was of Council with the Plaintiff in the principal Case.

Blewet & al' versus Appleby.

Trin. 10 W. 3. Rot. 1335. C. B.

fo. 680.
Debt for
40 l. by the
Plaintiffs,
Sheriffs of
London.

DEBT on Bond by the Sheriffs of London a Bail-Bond; but in the Declaration it is not alledged that it was made to them by the Names of Sheriffs. After Oyer of the Bond, the Condition

is only enter'd in hæc verba, and then the Defendant pleads a fictitious Writ to make the Bond within the Statute of 23 H. 6. which he pleads. The Plaintiffs reply, and pray that the Bond may be enter'd in hæc verba, which is done accordingly, and then they shew the true Writ, whereby the taking of the Bond is warranted.

The Defendant rejoins, and the Plaintiffs surrejoins, and the Defendant rebuts, and then the Plaintiffs demur thereupon: But forasmuch as it was agreed that the Rejoinder, Surrejoinder and Rebutter, were not material to the Determination of the Point in Controversy, I have, to avoid Prolixity, omitted them.

fo. 685.

In this Case it was agreed, that by the Bar the Declaration was made ill *prima facie*; because it was not alledged, that the Bond was made to the Plaintiffs by the Name of Sheriffs: And then the main Question was, If the Plaintiffs by their Replication might amend and make it good by the Entry of the Bond on Record? And for the Defendant it was insisted that they could not; for the Declaration as it was at first, is that which is the Foundation of the Suit, and to which the Defendant is to answer, and on which the Court is to give their Judgment; and therefore it ought to be perfect at first, and if it be not so, Advantage is given to the Defendant, which he hath taken by pleading a good Plea in Bar, which ought not to be avoided by the doing of a thing which might have been done before, and by such means to trick the Defendant, who, notwithstanding any thing that appears, had another good Plea in Bar of the Action, if that Advantage had not been given him. If Debt be brought against an Heir, and in the Declaration it is

fo. 686.

not alledged that the Heir is bound ; can the Plaintiff, after Plea pleaded, enter the Bond and then demur ? Certainly No. The Bond also on which the Plaintiffs have declared, varies from the Bond enrolled : For the Bond in the Declaration is to be intended of a Bond made to them in their private personal Capacity, and the Law will so intend ; and the Bond which is enrolled is made to them in their Capacity as Sheriffs. If an Action is brought against one by Bill in *B. R.* if it appears by the Declaration that he is not chargeable but as Executor, the Bill shall abate ; and so it is adjudg'd, 1 *Saund.* 111. in the Case of the Dean and Chapter of *Bristol* v. *Guise*. So if an Original is brought against one in which he is not named Heir, if the Declaration be against him as Heir, it is ill and so it is adjudged by the whole Court 30 *H. 6.* 5. *a.* *Treby* Chief Justice was of Opinion, that the Defendant having taken Oath of the Bond, he ought to have enter'd it and then it had been Parcel of the Declaration, and that not being done by him, might be done by the Plaintiffs. And if the Defendant had pleaded *non est Factum*, would have been found against him ; and is the pleading of the Statute which gave the Plaintiffs Occasion to shew that the Bond was made to them as Sheriffs. And as to the Objection, that if Debt be brought against one as Heir, and in the Declaration it is alledg'd that he was bound as Heir, that it is ill he said, that in that Case the Declaration appears to be ill, but in this Case not, and it is impossible to make an ill Declaration against an Heir to be good by a Replication. After long Debate, *Cooke* Chief Prothonotary produced

duc'd ten Precedents of Writs and Declarations directly according to the Writ and Declaration in this Case, all which Precedents were enter'd *Mich. 24 C. 1. Rot. 1154, 1155.* And thereupon Judgment was given for the Plaintiffs by the Assent of *Powel* Justice, who before was of Opinion against the Plaintiffs. *Birch*, now one of the Queen's Serjeants, and *Lutwyche*, of Council with the Defendant; *Fuller* and *Girdler*, and others with the Plaintiffs.

Vide the Case of *Prince* and *Crompton*, *antea* pag. 238. for the like Variance between the Writ and Declaration as is in this Case.

Blacket *versus* Crissop.

Mich. 9 W. 3. Rot. 363. C. B.

DEBT per nup' Vic' Northumb' on Bond to prosecute a Replevin, &c. and indemnify the Sheriff, &c. Bar, by the Statute of 13 E. 1. Demurrer and Joinder in Demurrer. fo. 686.
Debt by the
Sheriff of
Northumb'

Judgment by the whole Court that the Bond was good and made according to common Practice. *Levinz* of Council with the Plaintiff, and *Lutwyche* with the Defendant. fo. 687.

Studholme & Ux' Executrix of Richard Morrison *versus* Mandall.

Trin. 9 W. 3. Rot. 1945. C. B.

IN Debt on Bond made to the Testator for the Performance of Covenants in a Lease made between the Testator and the Defendant, whereby the Testator Lease. fo. 688.
Debt by
Executors on
Bond to per-
form Cove-
nants in a
Testator Lease.

Testator demised to the Defendant a Mill, &c. habend' for 13 Years; and the Defendant thereby covenanted, inter alia, to leave as good Mill-stones on the said Mill at the Expiration of the said Term, as when he entred, or else to give Satisfaction in Money for as much as they should be worse, according to the Discretion of the Parties that viewed the same at the first. Bar, That at the End of the Term he left two Stones, and that the Parties who first viewed them, had not agreed how much they were worse, &c. and as to the other Covenants pleads general Performance. The Plaintiffs crave Oyer of the Indenture, and reply, that at the time of the Defendant's Entry there were two Stones of the Value of 3 l. and that at the End of the Term the Defendant had not left as good Stones, nor given any Satisfaction in Money. The Defendant rejoins, and only repeats his Bar. Demurrer and Joinder in Demurrer.

fo. 693.

The Plaintiff's Council objected, that it was incumbent on the Defendant to procure the Persons who view'd the Mill-stones at the time of the Defendant's Entry into the Mill to adjust how much the Mill-stones, which were left at the End of the Term, were worse than those which were there at the time of the Defendant's Entry into the Mill; and that for Default thereof he had broke his Covenant; for by his Plea he doth not pretend that he had left Stones as good as the first were. The disjunctive Covenant is the Covenantor's Advantage, and therefore he ought to shew, that the one or the other is performed; and therefore he ought to have procur'd an Adjudication, as if a Man bindeth himself to resign a Benefice, he ought to procure the Bishop to accept of his Resignation. So if a Man is bound to pay 100 l. or
so

so much as *J. S.* shall appoint, if he would excuse the Payment of the 100 *l.* he ought to procure *J. S.* to appoint a less Sum to be paid. To which the Defendant's Council answer'd, that by the Covenant he was to leave as good Mill-stones at the End of the Term, as were in the Mill at the time of his Entrance, or to give Satisfaction in Money for so much as they were worse, according to the Discretion of the former Viewers thereof; so that the Covenant is in the Disjunctive: And in a Disjunctive Covenant, if one part thereof becomes impossible, the Covenantor is excus'd from performing the other part, 21 *E. 3.* 29. b. 15 *H. 7.* 2. a. and *Dier* 262. were cited. And it was also said, that this Case was like a Bond of Submission to an Award, and therefore the Defendant was not bound to procure the Viewers to make any Adjudication, and they not having made any, and the disjunctive Covenant being for his Advantage, he was entirely excused. Whereupon it was said by *Powel* Justice, that Conditions are for the Benefit of the Obligor if possible, but if impossible, the Bond is absolute. There is no Impossibility in this Case, if the Viewers could not be procur'd to adjust the Damage: yet the Defendant might have left as good Stones at the End of the Term as were there at his Entrance, which is the other part of the Covenant. This Case is not like a Submission to an Arbitrament, for thereby both Parties bind themselves to stand to the Award of the Arbitrators, but neither of them binds himself to procure them to make the Award. But in this Case the disjunctive Condition being for the Defendant's Advantage, he ought to procure

fo. 694.

procure the first Viewers to make an Adjudication of the Damage. *Laughter's Case* is good Law ; but the Reason thereof given in *Co. 5.* hath been denied. If one binds himself to pay 10 *l.* or so much as *J. S.* shall appoint, if *J. S.* will not appoint any Sum to be paid, the Obligor shall pay the 10 *l.* If one is bound to make a Lease to *J. S.* or to pay him 100 *l.* before *Mich.* and *J. S.* dieth before *Mich.* the 100 *l.* ought to be paid. *Treby* Chief Justice did not speak much to the Case ; for he said he took it to be a plain Case for the Plaintiff. And he said that he had been inform'd by *Dolben* Justice, that the Reason of *Laughter's Case* had been denied in a Case in the time of *St. John* Chief Justice of *C. B.* and that two of the Judges in this Case had spoken with two of the Judges in *Laughter's Case*, who affirm'd to them that there was no such Reason given for the Resolution in *Laughter's Case*. The Case in the Time of *St. John* (as *Treby* Chief Justice said) was thus : A Man covenanted, in Consideration of 100 *l.* to make a Lease to *J. S.* for his Life before *Mich.* or to repay the 100 *l.* and *J. S.* died before *Mich.* And it was resolv'd that the 100 *l.* should be paid. And the Plaintiff in the principal Case had Judgment (the Chief Justice and *Powel* Justice being only present.)

fo. 695.
 5 *Co.* 23. b. The Case of *Laughter* is reported in 3 *Cro.* 398.
Cro. El. 539. by the Name of *Eaton and Menox v. Laughter*,
 p. 1. 716. p. more at large than in 5 *Co.* and for the Reso-
 41. lution in this Case and the Reason thereof, see
 those Cases and Books. Vide 3 *Cro.* 396. *Gre-
 ningham* and *Ewes's Case* 718. *Mills* and *Wood's*
Case 864. *More* and *Baker v. Morecomb.* *Mod.*
Rep. 264. *Basset's Case*, 2 *Jones* 95. *Warner*
 and *White's Case*, 3 *Lev.* 137. *Stanley* and
Fearne's

Fearne's Case, 1 *Mo. Rep.* 264. *Basset's Case*, 2 *Mod. Rep.* 200. the same Case, and the Notes in the Margen in the *New Dier.* 262. pl. 30. & *Nota.*

Sayor, *Admin'* of William Sayor, *v.* Clayton.

Pasch. 11 *W.* 3. *Rot.* 341. *C. B.*

IN Debt on Bond made by the Defendant to the Intestate, the Defendant craves Oyer of the Bond (which is entred in hæc verba) and then pleads in Abatement, that as well the two others named in the Bond as the Defendant bound themselves jointly, &c. Demurrer and Joinder in Demurrer.

fo. 695.
Debt on
Bond by an
Administra-
tor.

Wright Serjeant for the Plaintiff. This Bond is joint and several by Reason of the last Words, *Obligo me Hæred' &c.* for it is all one as if it had been said by all the three several Obligors severally, *ad quam quidem solutionem obligo me &c.* And he also took another Exception to the Plea, *viz.* That it did not appear thereby that the other Obligors, or one of them, was alive at the Time of the Purchase of the Original; and it shall not be intended, especially in a Plea in Abatement. And for that he cited 3 *Cro.* 494, 495. *Ascue v. Hollingworth*, which is a Case in point in Effect.

fo. 696.

fo. 697.

On the other side it was insisted by *Girdler* as to the first Objection, that the Words *obligo me &c.* were void, because it was thereby altogether uncertain to whom they are to be referr'd. And as to the other Objection he said, that it ought to be shewn on the other side that the other Obligors were dead; and for

for that he cited 3 Cro. 544. *Afcue* and *Hollingworth's Case*. 1 Sid. 420. *Chappel* and *Vaughan's Case*, and 1 Saund. 291. same Case. But *Quære* if those Cases make any thing for the Defendant. Judgment was given that the Defendant *respondeat ouster*, and then he pleaded the same Matter in Bar, with an Averment that the other Obligors were alive; whereupon Judgment was given for the Plaintiff because the Matter was not pleadable in Bar; and the Matter ought to have been pleaded in Abatement of the Action, altho' it was then insisted by *Levinz* that it was pleadable in Bar, and for that he cited Co. 5. *Robinson's Case*. But I don't apprehend that that Case maintains what was said.

Note, That *Powel* Justice was of Opinion, that the Bond in the principal Case was joint and several for the Reason before given by *Wright* Serjeant. But the Chief Justice said he much doubted how it could be distributive to all the Obligors. To which *Powel* said, that the Heirs are not bound before the Words *Ad quam quidem solutionem &c.* And if by those Words the Bond is not several, they are not bound. And certainly it was the Intent of the Parties that their Heirs should be bound. But this Point was not resolv'd by the Court.

Dottin *versus* Dowrich.

Trin. 12 W. 3. Rot. 1313. C. B.

fo. 698.
Debt on
Bond.

IN Debt on Bond for 200 l. dated 5 July, 10 W. 3. the Defendant crav'd Oyer of the Condition, which being very special, followeth at large.
That

That whereas the good Ship Mary Anne of Plymouth, John Neale Master, now is, or lately was, at the Isle of May, bound from thence to Virginia, and from Virginia to Plymouth, or some other Port in England, for the Discharge and Ending of her said Voyage; And whereas the abovebounden Nathaniel Dowrich hath this Day received of and from the abovenamed George Dottin the Sum of 100 l. of lawful Money of England, to be born and adventur'd in and upon the said Ship, for and during the said intended Voyage. Now the Condition of this Obligation is such, That if the said Ship were safe at the Isle of May on the Five and twentieth Day of March last past, and well and sufficiently Mann'd, Victuall'd, Tackled, and provided for the said premised Voyage; and being so Mann'd, Victuall'd, and provided, did or shall proceed in the said Voyage, and having finish'd the same, do return to Plymouth, or some other Port in England which shall happen to be the Port of her Discharge; then if the abovebounden Nathaniel Dowrich, his Heirs, Executors, Administrators or Assigns, do and shall well and truly pay, or cause to be paid, unto the abovenamed George Dottin, his Executors, Administrators or Assigns, the full Sum of 125 l. of lawful Money of England within Twenty Days next after the safe Arrival of the said Ship at Plymouth, or elsewhere within England, as aforesaid, that then this present Obligation to be Void; otherwise to be in full Power, Force and Virtue. And then pleaded that the Ship was safe at the said Isle of May the said 25 Mar. well Mann'd, Victuall'd and Tackled; that the Ship arriv'd at Virginia, &c. But by Stress of Weather in the Voyage from the Isle of May towards Virginia, was disabled, &c. Replic', that the Defendant voluntarily permitted the Ship to become unable for want of Repairs, with an Intention.

tion to defraud him. Rejoinder repeats the Matter in the Bar, absque hoc that the Defendant permitted the Ship to become unable, &c. Demurrer and Joinder in Demurrer.

fo. 700.

The Plaintiff's Council did not insist to maintain the Replication, but took an Exception to the Plea in Bar, viz. that it is not thereby alledg'd that the Ship was sufficiently *provided for*, which is a principal Part of the Condition; for the Plea only saith, that the Ship was well mann'd, victualled and tackled, but nothing is said as to any Provision made for the Ship. To which the Defendant's Council answer'd, that that was comprehended in the Words *mann'd, victuall'd and tackled*. But the Court was of a contrary Opinion, because in the Words *provided for*, the necessary Reparation of the Ship was comprehended. And then it was insisted for the Defendant, that, as the Condition is penned, the Defendant was not to pay the 125 *l.* till after the Arrival of the Ship to some Port in *England*. But to that the Court said, that the Intent of the Condition was, that if the Ship did not arrive by reason of any Default in the Defendant, yet he was to pay the 125 *l.* And it is highly probable that there was a Default in the Defendant, because he hath not answered to a material Part of the Condition, viz. the Provision for the Ship. And the rather, because nothing material is said in the other Part of the Plea to make it appear that no Default was in him: For it may be true that the Ship was disabled to perform the Voyage by Force of Wind; but that might be by reason the Ship was not well *provided for*, and so by that means was weak to resist the Wind; and for that the Plaintiff had

had Judgment by the Opinion of the whole Court.

Powel Justice said, that the Defendant ought to have pleaded according to the Words of the Condition. But the Chief Justice said, that he ought to plead according to the material Words of the Condition; for if there are synonymous Words in the Condition, it is sufficient to use one of them. But yet in this Case the Plaintiff had Judgment for not answering to one of the Words of the Condition.

Note, In the Plea in this Case it is said, that the Ship was *tuta apud præd' insulam Maii existen' in partibus transmarinis, viz. apud Chudleigh præd'* which, as 'twas said by the Court in *Davis* and *Tales's* Case *postea*, *Pag.* is repugnant and absurd. And I also by good Authority take upon me to say, that in this Case it was not necessary; for the Bond being made in *England*, an Issue on any thing done beyond the Seas may be try'd where the Obligation is alledg'd to be made, as appears in the first Institute, 261. and other Books; of which I have taken particular Notice here, to prevent the like Absurdities (if possible) for the future, for I have seen many Pleadings with those repugnant Words in them.

fo. 701.

D I S C E I T.

The Earl of Plymouth v. Sam' James & al'

fo. 711.
A Writ of
Disceit for le-
vyng a Fine
of Lands in
antient De-
mesne.

SI Other Comes Plymouth &c. pon' &c. J. W. filium & hæred' J. W. T. B. filium & hæred' T. B. &c. quod sint &c. ad respondend' præfat' Comiti de placito quare cum idem Comes modo existit & per 10 annos &c. seisit' fuit de Manerio de B. &c. in Dominico suo ut de feodo quod quidem Manerium est & a tempore &c. fuit de antiquo Dominico &c. ac omnia terræ &c. placitabil' & placitat' fuer' in Cur' Maner' ill' per parvum breve de recto &c. Præd' Samuel' &c. præmissor' non ignar' machinan' &c. quidam Finis se levarit in Cur' Domini Reg' de Banco hic scil' &c. coram &c. inter præfat' J. W. patrem &c. queren' & præfat' J. B. patrem &c. deforcient' de &c. Unde duo Messuag' &c. sunt & tempore levationis &c. fuer' tent' de Manerio præd' & a toto tempore supradict' usque &c. in Cur' Manerii placitat' & placitabil' fuer' Cujus quidem Finis prætextu eadem duo Messuag' &c. liberum Tenement' &c. devener' in Deception' Cur' præd' & ad Exhæredation' ipsius Comitis quoad &c. ad dampn' &c.

fo. 712.

On the Occasion of this Writ of Disceit, I observe, that there is no Original Writ of Disceit in such Case as this is, either in Fitzherbert in his *Natura Brevium*, or in the Register. In *Fitz. 98. a.* it is only said, that if a Man levy a Fine of Land in antient Demesne at the Common Law to another, the Lord of the antient Demesne shall have a Writ of Disceit against him that levied the Fine and him that is Tenant. True it is, that in the Register

Register, fo. 13. b. there is a *Venire facias* or *Scire facias* (which is all one in Effect) to annul a Fine levied of Lands in ancient Demesne, which Writ is founded on the Tenour of a Fine transmitted out of *Chancery* to the Justices C. B. *sub pede Magni Sigilli*. Which Writ requires the said Justices to do Right *vocat' coram eis quos fore evocandos videret'* and vide for that a Case on such a Writ, 21 Aff. nu. 13. I can't find in all my Books of Entries any Precedent of a Writ of Disceit for the levying of a Fine, &c. save three; the first is in *Winch* 26, 27. which is brought against the Plaintiff in the Fine only; and there is a Demurrer to the Count, and yet by the Record it self, which I have caused to be searched, Judgment is absolutely given for the Plaintiff, and a Writ of Inquiry of Damages is awarded because the Demurrer was in Bar of the Action. The second Precedent is in *Hearn* 93. And in that the Writ is brought against the Deforçant only. And the third Precedent is in *Brownl. Redivivus* 25. And that is brought against the Plaintiff and Deforçant in the Fine. And beside what is said by *Fitzh.* as before, it is resolv'd in the said Book of Affizes before-cited, that all those who have Estates in the Land, either in Possession, Reversion or Remainder, ought to be Parties to the Writ; and therefore in that Case a *Scire facias* was awarded to warn one who had an Estate in Remainder. But in the Case of *Zouch and Thompson*, which is entred *Hill. 7. W. 3. Rot. 1832. C. B.* there in a Writ of Disceit, &c. the Fine was levied between *Stephen Thompson* Plaintiff, and *John Sellon*, and *Elizabeth* his Wife, Deforçants; who being all dead, the Writ of Disceit was

T brought

fo. 713:

Salk. 210. p. 1.

brought against *Christopher Thompson*, Son and Heir of the said *Stephen*, and *William Sellon* Brother and Heir of the said *John Sellon*, and one *James Goodyer* Tertenant and a Purchase by the Fine. And these Exceptions were taken to it.

1. That this Writ doth not lie against an Heir because it is a personal Tort & *moriturum cum persona*, and for that 18 E. 4. 11. a. was cited, but *non allocat'*; for *per Cur'* the Case here is not like to the Case of *Veiors* and *Per-nors*, in which Case the Action is confin'd to the Life of the Parties; for here it is not a mere personal Tort, but a Disherison of the Lord of the Mannor, and therefore it is unreasonable that the Act of God should defeat the Lord of his Action.

2. Another Objection was, that if the Action would lie against the Heir of *John Sellon*, one of the Conusors of the Fine, then the Writ ought to be brought against the Heir of *Elizabeth*, the Wife of the said *John Sellon*, who was joint Conusor with him. But *non allocat'* because the Tertenant is the proper Party to this Action and others (if necessary) may be brought in by *Scire facias*, *Fitzh. Fines* 30.

3. Another Objection was made in the Case of *Zouch* and *Thompson*, that in the Writ and Count the Plaintiff is named *Dominus Manerii* only, without shewing any Estate that he had in the Mannor, and that the Writ and Count were ill for that Defect: *sed non allocat'* because Tenant for Years, Tenant for Life, &c. *sunt Domini pro tempore*, and if it was necessary, the Words *ad Exheredationem* are sufficient, and for the Loss which they sustain may have an Action. Another Question

Question was made in that Case, whether the Fine should be revers'd *quoad* the Benefit of the Lord only, or entirely. But the Resolution of the Court was, that it should be revers'd not only in Respect of the Lord, but *quoad* the Purchasor also; and for that diverse Cases were cited.

Another Difference between the said two Precedents in *Winch* and *Hearne* is in this, That in *Winch* it is said that the Lands were *Placitat' & placitabil' in Cur' Manerii coram Ballivis & Sectatoribus ejusdem Cur'*: And in *Hearne* it is only said, *in Curia Manerii*, without saying before whom holden. And sometimes it is pleaded *in Curia Manerii*, with the Addition of these Words, *per parvum breve de Recto Clauso*. And all these Ways are warranted by the following Precedents, *Rast. tit. Ancient Demesne*, 1 and 3. *Hearne* 351. *Vet' Intrationes* printed 1546. fo. 91, 135 and 149. *Brownl. Red.* 504. *Rast. False Judgment*, Nu. 7, 8, 9, 14. *Rast. tit. Droit Close*, 1 *Brown's Entr.* 1. par. 2. *Thompson* 2. Nu. 13, 15. *Pymock and Hilder's Case*, 2 *Cro.* 559. Where in Ejectment the Defendant pleaded that the Lands were Ancient Demesne and pleadable by Writ of Right Close. The Plaintiff replied that the Lands were Copyhold, &c. *absque hoc* that they were pleadable by Writ of Right Close, and adjudg'd a good Traverse; altho' it was objected, that that was but the Consequence of Ancient Demesne. But that which to some would *prima facie* seem strange, is, that the Court should be said to be holden *coram Ballivis & Sectatoribus*. But as to that it is to be observed, that in all the said Precedents in which the Court is mention'd to be held before the Bailiffs and Suitors, it is

fo. 714:

saïd either *coram* A. B. & C. D. *Ballivis* & *Señatoribus*, or *coram* A. B. & C. D. &c. *Ballivis* & *Señatoribus* &c. And then it is to be intended, that the Bailiffs were not only the Bailiffs of the Mannor, but also the Suitors of the Court; for without doubt the Suitors are the Judges of the Court, as appears in *Inst.* 269. and several other Books, particularly in 3 *Leon.* 63. *Abraseal* and *Nurse's* Case; for in a Writ of false Judgment in a Writ of Right Close, it was objected for Error as strenuously as it could be, that the Writ was directed to the Bailiffs of the Lord of the Mannor that they should do Right, &c. and yet it appears by the Record that the Plea was held before the Suitors, and not before the Bailiffs. But notwithstanding the Judgment was affirm'd on good Consideration, as it is said in the Book. But on the whole Matter (as I apprehend) if one should plead, or if it should be alledg'd in a Writ of false Judgment, that the Court was held before A. B. & C. D. *Ballivis*, & E. F. & G. H. *señatoribus* *Cur' præd'* it would be ill.

Ballivus Manerii est quasi Vicedominus; nam Domini loco omnia administrabat infra Manerium: tantaq; olim ejus erat celebritas, ut, absente Domino, Brevia aliquot Regia illi tanquam Domino mandarentur. Spelman's Glossary 69.

D O W E R.

Ann Bates, *late the Wife of Ralph Bates,*
versus Thomas Bates.

Trin. 8 W. 3. Rot. 1453. C. B.

COUNT in a Writ of Dower unde nihil habet, of Lands in several Villages. Bar, by Guardian, n' unques seisie que Dower, and Issue thereon. And a special Verdict is found, on which the Case is but thus; Lands are limited to A. for Life, Remainder to B. and C. for Years, Remainder to the Heirs Male of the Body of A. And the sole Question was, If by reason of the intervening Estate for Years, A. was so seised that his Wife should be endow'd.

fo. 719.
Dower unde nihil habet.

Salk. 254.
p. 4. S. C.

This Case was first argued Mich. 9 W. 3. 1697. by Wright the King's Serjeant on the part of the Demandant, and by Birch of Council with the Tenant. And the sole Point which was made in the Case, was, if the Demandant's Husband was so seised that the Demandant was dowable. And as to that the Case is but such, Lands are limited to the Use of A. for Life, Remainder to B. and C. for Years, Remainder to the Heirs Male of the Body of A. And for the Demandant it was said, that the intervening Estate for Years was no Impediment to the Execution of the Estate Tail. And altho' the Estate for Life and this Inheritance, were not so consolidated that the Term of Years should be merg'd or destroy'd, yet the Estate Tail was vested in the Husband. And that a Term

fo. 719.

fo. 730.

for Years is not any Impediment to Dower, it was said, that a Woman shall be endow'd of the third part of a Reversion expectant on a Term for Years, and of the third part of the Rent reserved thereon. *Rolls Tit. Dower* 678. nu. 7. If there be two Joint-Tenants in Fee, and one makes a Lease, that is no Severance of the Jointure. And it was said, that this Case was not like to *Stephens* and *Britridge's Case*, 1 *Sid.* 83. for there was an intervening Estate for Life. And if the Husband in this Case had made a Feoffment in Fee, it had been a Discontinuance of the Estate. But for an Authority in Point, *Perkins Sect.* 336. was cited, where it is said in the very same Case, that the Wife is dowerable; for the mesne Remainder for Years shall be no Impediment, but that the Freehold was sufficiently rejoin'd in the Husband *simul & semel*.

Of the other side it was argued, that the Freehold and the Inheritance ought to be in the Baron *simul & semel*, or otherwise the Wife shall not be endowed; and for that, *Perkins Sect.* 337. was cited. But in the Case in Question he was but Tenant for Life, and he could not have made a Lease as Tenant in Tail according to the Statute; for if he had reserved a Rent, it shou'd not go to the Issue in Tail by Reason of the intervening Estate: And for that 50 *E.* 3. 4. nu. 9. was cited, and the Case of *Duncomb* and *Duncomb*, which is now reported in 3 *Lev.* where it is adjudg'd, that where *W. D.* was Tenant for Life, Remainder to *J. S.* and his Heirs for the Life of the said *W. D.* Remainder to the Heirs Male of the Body of the said *W. D.* that

that the Wife of the said *W. D.* shall not be endow'd.

The next Term after, it was argued again by the Council on both sides. And for the Demandant it was said, that the Estate Tail was executed to this purpose of Dower, but not so as to defeat the intervening Estate for Years. It was agreed that if there had been an intervening Estate for Life, that then the Demandant had not been dowable; and the Cases before cited of the other part are only to that Purpose. But the Intervention of an Estate, so mean and inconsiderable in the Eye of the Law as an Estate for Years is, would not hinder the Conjunction of both the Estates as to the purpose of Dower.

Estates for Years at the Common Law were of so small an Esteem, that they were subject to, and under the Power of the Tenant of the Freehold; for if he had suffer'd himself to be impleaded in a real Action, altho' on meer Collusion to bar the Estate for Years, the Tenant for Years had not any Remedy to avoid a Judgment against the Tenant of the Freehold, before the Statute of *Gloucester*, as 'tis said in *Co. Litt.* 46. *a.* And in *Ascough's Case*, *Co.* 9. 135. *a.* it is said by the Lord *Coke*, that if *A.* be Lessee for Years, the Remainder to *B.* for Life, and after the Lessor grants over his Reversion, that the Attornment of the Tenant for Life in Remainder is good, and the Tenant for Years shall be bound thereby, without any Attornment by him, and that for the same Reason which is before given. If there be Tenant for Life, Remainder for Life, Remainder in Fee, that intervening Estate being an Estate of Freehold, is an Impediment

A. Lessee for Years, Remainder to *B.* for Life, if the Lessor grants his Reversion and *B.* attorns, it is good, and shall bind *A.*

fo. 731.

to an Action of Waste ; but the Intervention of an Estate for Years is not so, because it is but a Chattel Interest, by which the Lessee is entitul'd to have the Possession and Profits of the Lands, and is of another Nature than that of the Freehold. *Co. Litt.* 53. The Reason is more strong in the Case of Dower, which is a Favourite of the Law. The Estate of Freehold and the Inheritance were entirely in the Husband, without Fraction or Division ; and the intervening Estate for Years doth not make any Gap or Stop between the Freehold and Inheritance, but being of the same Nature, they close and unite together, leaving out the Estate for Years as distinct and of another Nature.

It was also said, that altho' the Case in *Perkins* before cited was the only direct Authority that could be found in the Books, yet there were other Cases by which the said Opinion might be strengthen'd ; for if *A.* makes a Lease for Life, and after makes a Lease for Years to another, and the Lessee for Years dieth intestate, and the Ordinary committeth Administration, and the Administrator and the Tenant for Life join in the Purchase of the Inheritance, the Fee is executed for one half by all the Justices. *Goldbolt* 1 and 2. And it is there said by *Manwood* Chief Baron, and not denied by any, that if Lands are given to one for Life, Remainder to another for Years, Remainder in Fee to the Tenant for Life, the Fee is executed in the Tenant for Life : So that if he loses by Default, he shall have a Writ of Right, and not a *Quod ei desorceat*, because the Term for Years is no Impediment to the Execution of the Fee ; and no Man can bring a Writ of Right

Right, but he that hath the Fee Simple in him.

Shelley's Case in 1 *Coke*, as to this purpose, is but such; Lands were conveyed to the Use of *Edward Shelley* for Life, and then to the Use of *A.* for 24 Years, and after to the Use of the Heirs Male of the Body of *Edward Shelley*, and to his Heirs Male. And the Question was, Whether the Heir Male of *Edward Shelley* took by Descent or Purchase. The Lord *Coke*, in his Report of that Case, takes no Notice of the intervening Estate for Years, because perhaps he did not think it was worthy any Consideration. But *More*, in his Report of the said Case, 136. says, that it was objected that the Interposition of the Estate for Years between the Estate for Life, limited to *Edward Shelley*, and the Limitation to the Heirs Male, had prevented the Execution of the Estate Tail. But to that it was answered by the Council of the other side, that it was not any Impediment, because the Term was but a Chattel; and so was the Opinion of the Court, as it is there said.

The Power which the Demandant's Husband had over the Estate, is an Argument that he had an Estate Tail executed in him. Admitting that the Estate in Fee had not been limited to him, and that a Writ of Right had been brought against him, he might have joined the Wife in a special Manner, which a Tenant for Life could not do, except Tenant in Tail after Possibility, in respect of the Quality of the Estate which he once had, as it is said in *Lewis Bowles's Case*, 11 Co. 80. *a* and *b*. His Fine, and also a Common Recovery suffered by him, had been a
Bar

Bar to the Issue in Tail, and his Feoffment had been a Discontinuance. The Case of *King and Edwards* hereafter mentioned, will in reason prove it; in which Case it is adjudged, that if the Husband and Wife are seised to them and the Heirs of the Body of the Husband, that his Feoffment is a Discontinuance. And so it is adjudged in *Hornwood* and *Holman's Case*, 2 *Bulst.* 29. And in *Mervel and Humfrey's Case*, *Raymond* 126. it is adjudg'd, that it is an Estate Tail executed to some Purpose; *à multo fortiori* in this Case, where the Husband only had the whole Freehold, and no other any Part thereof.

If a Term for Years had been limited to *J. S.* before the Limitation for Life to the Demandant's Husband, he might have had an Action of Waste for Waste committed by *J. S.* And if the *Baron* had been disseised, and the Disseisor had died seised, and then the Demandant's Husband and the Tenant's Father had died, so that the Tenant had been put to an Action to recover the Lands; what Action could he have save a *Formedon in Descender*? in which a Gift of an Estate Tail to his Ancestor, and also a Seisin of the Estate Tail in his Ancestor, is always alledged; for otherwise there can be no Descent to the Heir.

It hath been objected, that if a Man was to plead in this Case, he ought to say that the Husband was seised for Life, Remainder to the Trustees for Years, Remainder to the Heirs Male of the Husband. But to that it may be answer'd, that if the Trustees were to plead their Estate, the Pleading ought to be so; for as to them the Husband was not compleatly seised in Tail. But the Husband,

or his Heir in Tail, against any Stranger may plead, that the Lands were conveyed to him and the Heirs Male of his Body, &c. and it can't be otherwise in a Count in *Formedon*. And in *King and Edwards's Case*, reported by *Rolls*, *Tit. Discontinuance* 634. Let.

D. Nu. 3. it is said, that it was adjudg'd in that Case, that if Lands are given to Husband and Wife, and to the Heirs of the Body of the Husband, and the Husband makes a Feoffment, that it is a Discontinuance, because he was seised in Tail: And so it shall be pleaded *à multo fortiori* in this Case, where the Husband had the whole Freehold and Fee in himself. And in *Edwards and Wooder's Case*, *Cro. Car.* 323. it is held, that he who hath but a Reversion expectant on an Estate for Years, may plead that he is seised in *Dominico suo ut de Feodo*, because if the Lessee be ousted he may have an Assise; and with this, as to the said Reason, *Dier* 354. b. and *Fitzh. Assise* 424. agree.

If Baron and Feme are seised to them and the Heirs of the Baron, his Feoffment is a Discontinuance.

And as to the Objection, that the Husband in this Case could not have made a Lease, according to the Statute 23 H. 8. to that it may be answer'd, that it is for a particular Reason, *viz.* because by that Statute an annual Rent is to be reserv'd due and payable to the Lessor and his Heirs during the Term; which could not be in this Case, by reason of the Term for Years, which would fall in Possession to the Trustees after the Death of the Husband. But therefore *non sequitur* that the Wife of the Husband is not dowerable.

fo. 733.

It was said on the Part of the Tenant, that the Reason of Dower was because it should be a Support for the Wife and her Children, which could not be in this Case after so long

a Term of Years. And it was also said, that the Estate was vested, but not executed, so that the Wife shall be dowable; and beside the Cases which were cited on the Tenant's part on the first Argument, the following Cases were also cited, 1 E. 3. 15 and 16. and 40 E. 3. 13. *Br. Dower* 89. 1 *Roll's Abr.* 677. nu. 9. where it is said, that the Husband ought to have a Fee or Fee-Tail, and Freehold in Possession, otherwise the Wife is not dowable. But *vide* the Book at large, which is there abridg'd, viz. 46 E. 3. 16. b.

At first there was some Diversity of Opinion between the Judges, but at last without any solemn Argument by them Judgment was given for the Demandant, which was pronounc'd accordingly. *Levinz* of Council with the Tenant, and *Lutwyche* with the Demandant on the last Argument.

On the Argument of this Case it was said by the *Treby* Chief Justice, that Dower was a Demand out of the Freehold and Inheritance, and that in the Case here no part of them was out of the *Baron*, and that perhaps the Husband could not have made a Discontinuance: But he said expressly, that at the very Instant the Husband died the Estate entirely descended to the Tenant, and that the Wife was not dowable of a Seisin in an Instant. He also said, that there was no Difference when the Estate for Years precedes the Husband's Estate, and where it is subsequent thereunto; for the Husband is not seised in Possession in the one Case or the other.

And it was said by *Powel* Justice, that he thought the Husband could not have made a Discontinuance in this Case, but after he said

said that if *A.* be Tenant for Life, Remainder for Years, Remainder in Fee to *A.* who dieth seised, and a Stranger abates, the Heir shall have a *Mort d'Ancestor*.

How Judgment and Execution shall be when a Term for Years is in *Esse*, *vide* 3 Cro. 564. *Wheatley and Best's Case*, *Godbolt* 105. *Foliamb's Case*, *Roll's Tit. Dower*, 678. *nu.* 7, 8. *Winch* 80.

Lawrence *versus* Dodwell & al.

Trin. 10 *W.* 3. *Rot.* 1659 *C. B.*

COUNT in a Writ of Dower. Bar, that *W. L.* the Demandant's Husband, devised Lands to the Demandant *durante viduitate sua* with an *Averment*; that the said Devise was in full Recompence of her Dower. Demurrer, &c.

fo. 734.
Dower.

In *Mich.* 10 *W.* 3. this Case was argued by *Wright* the King's Serjeant for the Demandant, and by *Levinz* for the Tenant. And for the Demandant it was said, that at the Common Law, before the Statute of Uses, an Estate of Freehold could not be barr'd by any collateral Satisfaction, *Vernon's Case*, *Co.* 4. 1, 2. but since that Statute, a Title of Dower may be barr'd by a Jointure made to the Wife, in which it is express'd or averr'd to be for the Jointure of the Wife. But a Devise to the Wife can't be averr'd to be for her Jointure, or in Satisfaction of her Dower, *Co.* 4. *Vernon's Case*, *Ref.* 5. It is but a Benevolence, *Br. Dower* 69. The Constructions of Wills ought to be collected by the Words of them, and not by any Averments out of them, and it would be mischievous to admit

fo. 735.

admit it ; for no one can know what Advice to give on a Will if collateral Averments should be admitted out of the Words of the Will.

On the other side it was said, that there may be a Construction according to the Intent of the Testator, tho' not in the Words of the Will ; as a Devise to *A.* after the Death of his Wife is a good Devise to the Wife, &c. *Br. Devise* 48. And that Construction arises from the Intent of the Testator, and not from the Words of the Will. So if a Man wills that his Feoffees should be seised to such Uses, and he hath no Feoffees, yet it is a good Devise to those Uses, *Pop.* 188. *Br. Devise* 48. *Dier* 326. *b.* He also cited *11 H. 6. 13. a.* A Devise to *J. Cotton* where there are two of that Name, this may be supplied by Averment ; and altho' that was before the Statute when one might devise by Parole, yet the putting the Devise in Writing doth not alter the Case.

A Fine on Grant and Render may be averr'd to be to an Use, *2 Co.* 76. and he also cited *Cheney's Case*, *Co.* 5.

Powel Justice. The Averment ought to be collected out of the Words of the Will ; it is not safe to admit a Jury to try the Intent of the Testator ; a Will can't refer to Words only without Writing. But it ought to be a Will in Writing, *Molineux* and *Molineux's Case*, *2 Cro.* 145. and therefore there can't be any Averment to add any thing to it, by Words *dehors*, or to abridge it by a Condition added to it by Words.

He said that the Case is the same with the Case cited in *Vernon's Case* (by which he intended, as I presume, *Leak* and *Randall's Case*,

4 Co. fo. 4. a.) which Case is, that Land is devised to the Wife for Life that can't be averr'd for the Wife's Jointure, because a Devise in it self imports a Consideration.

fo. 736.

But he said that he was not satisfied with such Reason; for a Fine on Grant and Render imports a Consideration, and yet it may be averr'd to be to an Use. And he said, that that Case is not to be found in any other Book, but that the Lord *Coke* did rely much on it in his 1 *Inst.* 36. b. where he saith, that a Devise by Will can't be averr'd to be in Satisfaction of Dower, unless it be so express'd in the Will. And the true Reason of the Law that no such Averment lies, is, because the Will ought to be entirely in Writing. The Intent of the Testator is only to be collected by the Words of the Will; if any thing for the Tenant's Benefit had been to be collected from the Words of the Will, he ought to have pleaded it; but if the Devisor's Name is omitted, or if the Devise is to his Son *John*, where he hath two Sons of that Name, in those Cases there may be an Averment, for the Words of the Will will bear it. He also cited *Fuller* and *Fuller's Case*, 3 *Cro.* 422. *More* 31, 353. *Dier* 61. and 2 *Rep.* 28. He also said there was a Case which was thus: A Man devised all his Lands which he then had, or at the time of his Death should have; and that it was the Opinion of *Maynard* Serjeant, that the new purchased Lands would not pass; but that *Polexsen* was of the contrary Opinion. But the Matter was referred to the Lord Chief Justice and himself, and by them ended: But to what Chief Justice the Reference was, no Mention was made that I heard.

If Lands newly purchased will pass by a Devise of the Lands which the Devisor hath or shall have, &c.

At

At another Day the Case was again argued by *Wright* Serjeant for the Demandant, and *Pawlet* Serjeant for the Tenant. And *Pawlet* Serjeant argued that the Averment was good. And *first* he insisted on the Nature of Devises, which are but presumptive Benevolences; and therefore there may be an Averment to defeat that Presumption, by making the Bar of Dower to be the Cause of the Gift, and the Consideration of the Devise. *Secondly* of the Nature of Averments, which is an Offer to prove any thing material to maintain the Plea in Bar, and may be prov'd on Evidence, as well as averr'd in Pleading. And he insisted on the fifth Resolution in *Vernon's* Case, where it is resolved, that altho' the Feoffment was on express Condition to perform the Will of the Feoffor, which imports a Consideration; yet an Averment may be taken that it was for the Wife's Jointure, because the one Consideration may consist with the other. He also cited the Case of *Leake* and *Randal* before; and also cited the Case mentioned in *Cheney's* Case, of a Devise to his Son *John*, &c. He further said, that it was absurd to make an Averment necessary in all Pleadings, and yet not to admit any Use to be made thereof. All Averments are to no purpose but to prove something material in the Case, which is Matter *debors*, and not comprised in the Words of the Writing to which they refer; every Averment is foreign to them either in Words or Matter. He that avers any thing, takes upon him to prove it by proper Evidence, and therefore he ought not to be precluded from such Averments. Such Averments may be made on Evidence by

Wright

Wright Serjeant for the Demandant. And beside what he said before, he now said that he also relied on *Vernon's Case*, Co. 4. for in the fifth Resolution there it is said, that a Devise imports a Consideration in it self; and as a Devise can't be averr'd to be to the Use of another if it be not express'd in the Will, so by the same Reason it can't be averr'd to be in Satisfaction of Dower unless it be express'd in the Will.

If the Words of the Will import that the Devise of the Lands was in Recompence of Dower, then it ought to be pleaded that the Testator devised them in Recompence and Satisfaction of her Dower, and then the Will would be given in Evidence to prove it. But in the Tenants Plea there are no such Words, or Words which *tantamount* in the Will. But the Averment is merely *dehors*, which is not to be admitted, because Lands can't pass by Devise, but by Words in Writing.

Treby Chief Justice. This Averment is *dehors* the Will; If it had been said that the Devise to the Demandant was for her Jointure, it had been good, tho' the Word *Jointure* was not in the Will, if there had been Words in it which *tantamount*; as if it had been said that the Devise was to her for her Provision, or the like Words; so that such Intent might appear by the Words of the Will. No Evidence *dehors* the Will can be admitted, for then one part of the Will would be in Writing and the other not; Parole Discourses *dehors* the Will are of no Signification, for it ought to be entirely in Writing. If one hath two Sons named *John*, and he deviseth his Lands to his Son *John*, it may be averr'd which Son *John* he intended, and it may be

U prov'd

prov'd by him who wrote the Will, or by another present at the Time it was made. But that doth not oppugn what is before asserted, because *John* is wrote in the Will, and Words of Implication are as good as express Words. The Plea need not be drawn in the express Words of the Will, but as the Law speaks on them. An Intent imply'd by the Words is as good as an express Intent. Judgment for the Demandant *per totam Curiam*.

EJECT.

EJECTMENT.

Humfry versus Bathurst.

Hill. 35 & 36 C. 2. Rot. 694. C. B.

IN Ejectment on the Demise of T. Cramp of the Mannor of Pullens, &c. the Defendant pleaded Not Guilty. The Jury, as to the two third Parts of the Whole in the Declaration, found the Defendant Not Guilty, and as to the other third, That Paul Bathurst was seised in Fee, &c. and by Indenture between him of the one part, and Edward his eldest Son and others of the other part, it is mentioned, that the said Paul for the Preferment of the said Edward, &c. granted, enfeoffed, alien'd and confirm'd the Premisses to the said Edward & al' and their Heirs, to the Use of himself for Life; the Remainder to such Persons as he should appoint by his Will, &c. for the Term of seven Years, and for Default of such Appointment, to his Executors, &c. for seven Years, &c. Remainder to the said Edward his Son for Life; Remainder to his Sons successively in Tail Male to the fifth; Remainder to the right Heirs of the said Paul. Paul died seised. Edward his Son entred, and had Issue Thomas his first Son (who died without Issue;) Edward his second Son (who had Issue Edward) the Defendant; William his third Son, the Husband of Elizabeth (who made the Lease to Cramp the Lessor of the Plaintiff,) and Richard his fourth Son. That Mich. 7 C. 1. the said Thomas as Tenant suffer'd a common Recovery. That the said Thomas in Feb. 8 C. 1. by Indenture reciting that he was seised in Fee, &c. covenanted to stand seised to the Use of himself and Elizabeth Hooper, whom he intended to marry, for their Lives;

fo. 740.

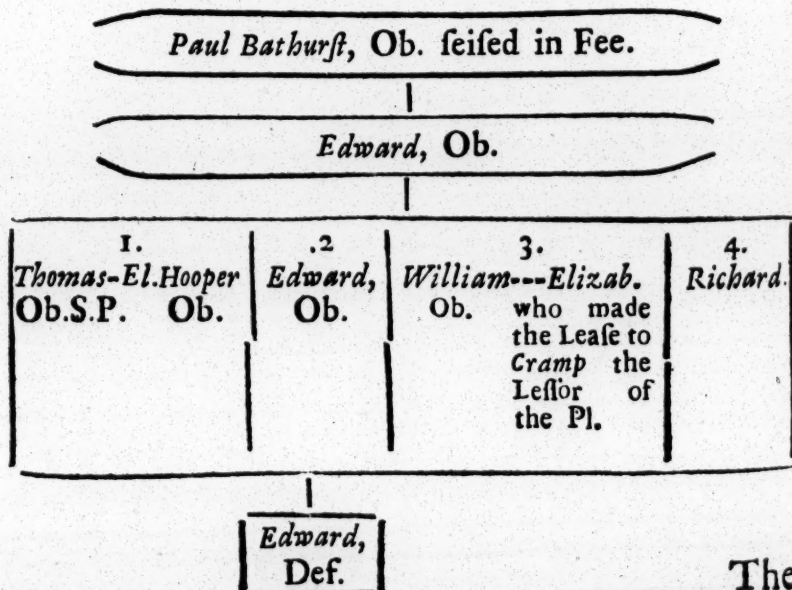
Ejectment

on the Demise of T. Cramp of the Mannor of Pullens, &c.

Remainder to the first Heir of their Bodies in Tail Male, and so to the sixth; Remainder to his right Heirs. That the said Thomas died without Issue. That the said Elizabeth entred. That the said William, the Brother of the said Thomas, made his Will, and thereby devised his third Part to his Wife Elizabeth the Lessor, &c. and died. Elizabeth, the Relict of the said Thomas, died. That the Defendant Edward, Son and Heir of the said Edward second Brother to the said Thomas, entred as Heir to Thomas. That the said Mannor of Pullens, &c. is ancient Demesne, and held of the Mannor of Aylesford, which Mannor is also ancient Demesne. They also find that the Defendant being seised, &c. Recordatur inter placita apud Westm' &c. That a Writ of Disceit was brought by the Lord of the Mannor of Aylsford to reverse the said common Recovery, and that there was Judgment accordingly by Confession, and that the said Elizabeth is now alive. They also found the Lease-Entry and Ouster in the Declaration, and made a general Conclusion. Si Cul' &c.

fo. 754.

So much of the Pedigree in this Case as is requisite to make it more easy.



The

The Matter on which the Plaintiff's Council insisted in the Argument of this Case, was, that the Indenture made by *Paul Bathurst* was void, because no Execution thereof is found either by Livery and Seisin, Attornment, or otherwise, and consequently the Lands descended to *Edward* his Son and Heir, and from him (the Lands being *Gavelkind* Lands) to his four Sons ; and then the Entry and Seisin of the elder Brother, was an Entry and Seisin of all his other Brothers Coparceners with him ; and then *William* the third Brother, and the Husband of the said *Elizabeth*, had good Power to devise the third Part to the said *Elizabeth* ; and consequently the Lease made by her to *Cramp*, and the Lease made by him to the Plaintiff, are good.

But to that the Defendant's Council answered, that the Court of themselves will not take Notice that Lands in the County of *Kent* are of the Custom of *Gavelkind*, without something alledged or found of Record to prove it : And for that in *Litt. Sect. 265.* it is said, that Parceners by Custom are where a Man is seised in Fee or Tail of Lands called *Gavelkind*, in the County of *Kent*, and hath Issue divers Sons and dieth, such Lands shall descend to all the Sons by the Custom, and they shall equally inherit, and a Writ of Partition lieth between them, but then the Custom must be mentioned in the Declaration. And the Lord *Coke* in his Comment on that Section saith, that it was well said by *Littleton*, that in the Declaration Mention shall be made of the Custom, as to say that the Land is of the Custom of *Gavelkind*, but he shall not prescribe in it, and so it is of Burrough *English*. And these two vary in this Point from other Cu-

fo. 755.

U ;

stoms ;

stoms: For the Law, when they are generally alledg'd, will take Notice of them; but in this Case it is not alledged *omnino*, and therefore shall not be intended to be *Garvel-kind* Lands. And of that Opinion was the whole Court; and for that only Judgment was given for the Defendant, without speaking to any other Matter in the Case. *Lutwyche* was of Council with the Defendant.

Norton *versus* Ladd.

Trin. 1 Jac. 2. Rot. 695. C. B.

fo. 755.
Ejectment
on the De-
mise of Ceci-
ly Cooke.

IN *Ejectment on the Demise of Cecily Cooke and Mary Cooke, on Not Guilty pleaded, the Jury, as to Part of the Lands, find a Special Verdict; That one Edmund Cooke was seised thereof in Fee, being Copyhold Lands; That he had Issue Robert, Edmund and John; and Cecily, Ellen and Alice; That he surrendered to the Use of his Will, whereby he devised them to Ann his Wife for Life, Remainder to Edmund his second Son in Fee, and died; That after Edmund surrender'd to the Use of his Will, whereby he devised them to Alice his Sister, for the Term of her Life after the Decease of Ann his Mother. And after he devised them in these Words, Item, I give unto my Brother John Cooke the whole Remainder of all those Lands, &c. which I have given to Alice my Sister for Life, if he shall survive my Sister Alice. But if it shall happen that he shall depart this Life before my Sister Alice, then my Will and Mind is, that the said whole Remainder, and Reversion of all the said Lands, &c. given unto him, shall be unto the only Use, &c. of my Sisters Cecily,*

ly, Ellen, and Alice, and to their Heirs for ever. They also find, that the said Edmund and his Sisters died without Issue, 1 Aug. 1675. That Ann the Mother died; That the said John Cooke, on producing the said Edmund's Will in Court, was admitted, &c. That the said John Cooke made a Letter of Attorney to surrender, &c. to the Use of John Ladd and his Heirs, on Condition to be void on Payment of 106 l. on the 27th of Feb. 1683. which Surrender was made accordingly. That the said John Cooke died without Issue, 20 Feb. 1 Ja. 2. and that the said Robert Cooke died at the same time; That afterwards the said J. Ladd came into Court, and was admitted; That the Lessors of the Plaintiff are Cousins and Heirs of the said Edmund, John, Cecily, Ellen and Alice, viz. Daughters and Heirs of the said Robert their elder Brother. And the Jury farther find the Lease, Entry and Ouster. Et si super tot' materi- am, &c.

This Case was argued by Holt the King's Serjeant for the Plaintiff; and the sole Question which was made in the Case was, Whether an Estate for Life, or an Estate in Fee did pass to John by the Will of the said Edmund his Brother. He agreed that the Estates devised to the said John Cooke, and also to his three Sisters, were Estates in Contingency. But he said, that the grand Question arose on the Words, *I give the whole Remainder of all those Lands which I have given to my Sister Alice, &c.* and he argued, that by those Words an Estate for Life only pass'd to John Cooke. And he first considered the Word *Remainder*, and he defin'd it to be that which is left of a particular Estate, either precedent, determin'd, or incurr'd, or an Estate to commence after the Expiration of a prior Estate,

fo. 761.

fo. 763.

Co. Litt. 49. a. And he said, that if the word *whole* be taken away, the Question would not be difficult, but that the Estate would be for Life only. As if a Man deviseth to *A.* the Remainder to *B.* that will be for Life only. So that the Word *Remainder* implies not more than the Estate express'd carries with it. And the Word *whole* makes no Alteration; for the Word *Remainder* is as comprehensive as *whole Remainder*, for *indefinita Propositio & universalis* are all one.

Secondly, He considered to what the Word *whole* shall relate; and he argued that it should have Reference to the Land intended to be pass'd, and not to the Estate or Interest, or Limitation of what Estate it shall be: For the Words are, *I devise the whole Remainder of my Lands which, &c.* So it is in Effect as if he had said, *I devise the Remainder of my whole Lands which, &c.* But if it shall relate to the Limitation of the Estate which he intended to pass, then it is more clear that he did not intend to pass any other or greater Estate than he had pass'd before: And then it is as if he had said, *I devise my Remainder for the whole Estate, or for as great Estate as I have given to my Sister Alice;* and so the Word *whole* doth not enlarge the Estate, but explain it.

He agreed that in Devises the Intent of the Testator is to be the Expositor; as a Devise to a Man for ever, or to sell at his Pleasure, these and such Devises give a Fee; for thereby it appears that none shall have any Estate after it. *1 And. 51. Dier 35. Pla. 7. Bridgman 16. 105. Co. Litt. 9. b. 1 Bul. 62, 219, 222. Gouldb. 363.* It may be objected, that a Devise of his Remainder *tantamounts to*, a Devise of his Estate, and then there is no
Diffi-

Difficulty but that an Estate in Fee shall pass. But a Devise of all his Estate shall never take Place against the Intent of the Devisor; for altho' a Devise of all his Estate in all his Lands in Sale may pass a Fee, yet if after he devise the Remainder of all his Estate in Sale to another in Fee, by that Devise the first shall be controll'd. And he cited 1 *Rolls Abr.* 834. *Nu.* 13. where a Man devises his Lands to his Son and Daughter equally to be divided, this is not Fee, but for Life only, altho' it appears that the Testator intended that the Daughter should have as high an Estate as the Son; but because the Heir would be disinherited, it was adjudg'd that the Words *equally*, &c. shall not go to the Continuance of the Estate, but to the several Occupat'. So if a Man deviseth to another after the Payment of his Debts, that shall be but for Life, 3 *Cro.* 330. So altho' the Estate be small or remote, if the Intent of the Testator is, that the Devisee shall not have more or sooner, no Construction shall give more. And he cited 2 *Leon.* 129. and 193. *Latch.* 135. *Bridgman* 134. and said that the Case was new and *primæ Impressionis*.

Then he observed the Circumstances of the Will, 1. That the Testator was well apprised of what he intended to do: For he gave an expresse Estate for Life to his Sister *Alice*, and also after the Limitation of the Estate to *John Cooke*, he gave an expresse Fee to his Sisters; so that he seems to have intended but an Estate for Life to *John Cooke*, when he hath expressly limited both before and after what Estate shall pass. So by that Limitation to his Sisters and their Heirs, altho' they could have no Estate if *John Cooke* survived

A Devise to a Son and Daughter equally to be divided, is no Fee.

survived *Alice* his Sister, yet it is plain he intended but an Estate for Life to *John Cooke*.

It may be objected that it would be hard to suppose he would give an Estate in Fee to his Sisters, and but for Life to his Brother. But it may be answered, that it is plain he prefer'd his Sister *Alice* to his Brother *John*, for during her Life he should take Nothing. And the Remoteness or Smallness of the Estate operates nothing in the Case, if the Will of the Testator is so; and every Man in the making of his Will hath particular Reasons, which can't be known or maintained with Reason; but it sufficeth if it can take Effect. Wherefore he concluded, that the said *John Cooke* had but an Estate for Life; for when the Intent is not apparent, the Heir at Law shall not be disinherited.

Birch contra, That *John Cooke* had an Estate in Fee by the Devise. The Word *Remainder* is liberal, and the Word *whole* can't enlarge or add in legal Acceptation; but to express the Intent of the common People, it is of great Use and Signification, and *tantamounts* as if he devised all his Estate, and then there had been no Question but *John Cooke* had an Estate in Fee by the Devise. 3 Cro. 324, 325. *Mo. Rep.* 100. *Stiles* 282, 462. 1 Cro. 37. *Crips* and *Grissel's Case*, and *Wilkinson* and *Merriland's Case*, 447, 449.

The Case was afterwards argued by *Baldcock* for the Plaintiff, and *Lewinz* for the Defendant: But nothing in Effect was then said, but what was said before.

Exposition of the Words *whole Remainder*. In *Trin.* 3 *Ja.* 2. Judgment was given for the Defendant by the Opinion of the whole Court; for they apprehended that the Devise to *John Cooke* was all one in Effect as if the

the Testator had devised to *John* all the Residue of his Estate, in all the Lands which he had devised to his Sister *Alice*; and that the Words *whole Remainder* properly refer'd to the Estate in him undisposed of to his Sister *Alice*, and that those Words could not relate to the Quantity of the Land that the Testator intended to devise to his Brother *John*; for it is plain and without Question that he devised all his Lands to his Sister *Alice*. So that those Words properly and naturally have Relation to the Quantity of the Estate which the Testator intended to give to his Brother *John*, viz. all his Remainder, which is all one in Effect as all his Estate; For if the Words *whole Remainder* should only refer to the Lands which he intended to devise to *John*, that Devise would be altogether ineffectual; for he had no such Remainder, for it is impossible there should be any Remainder or Residue (which is all one as this Case is) of that which was devised to *Alice*; for all was devised to her: And therefore it seems necessary that those Words should refer to the Estate which the Testator intended to give to his Brother. And as to the Disinheriting of the Heir at Law, it was said, that it was out of the Consideration in this Case; for without doubt the Heir at Law was disinherited, either by the Devise to the Brother or to his Sisters; for the one or the other had Fee Simple on Contingency.

fo. 765.

King

King *versus* Dilliston.

Trin. 1 Ja. 2. Rot. 1322. C. B.

fo. 765.
Ejectment
on the De-
mise of A.
Goulty of
Lands in Swe-
fling.

IN Ejectment on the Demise of A. Goulty of Lands in Sweffling on Non cul' pleaded. The Jury found that the Tenements in question are Copyhold, Parcel of the Mannor of Sweffling Campsey; That Henry Warner and Elizabeth his Wife in her Right were seised thereof for her Life, Remainder to J. Ballet in Fee; That there is a Custom that if any Surrender be presented at the next Court, that then Proclamation shall be made that the Person who hath Right shall come, &c. and if no one comes to be admitted at that first Court, Proclamation shall be made in the same Manner at the other Courts; and if none comes at the third Court, then the Steward to command the Bailiff to seise the Lands to the Use of the Lord; That the said Henry Warner and Elizabeth his Wife, and the said J. Ballet, surrendred the Lands in question into the Hands of the Lessor, then Lord of the Mannor, to the Use of R. Freeman and his Heirs, who died before any Court, and J. Freeman his Son and Heir was, and is, within the Age of 21 Years; That the said Surrender was presented, &c. and that three Proclamations were made according to the Custom, but no Person came, &c. wherefore the Steward commanded the Bailiff to seise the said Tenements for the Lord of the Mannor (who is the Plaintiff's Lessor) which he accordingly did; whereupon the said Lessor, &c. entred for the Forfeiture, &c. And then the Jury found the Lease-Entry and Ouster; and if the Defendant was Guilty, then they found him Guilty; and if not, then they found him Not Guilty.

After

Ejectment.

301

After several Arguments, Judgment was given for the Defendant by the Opinion of the whole Court : But a Writ of Error was brought, and the Proceedings thereupon are reported at large in the 3 *Mod. Rep.*

fo. 769:
Show. 31. 83.
Salk. 386.

Hunt *versus* Bourne & al'

Hill. 5 *W. & M.* Rot. 763. C. B.

IN Ejectment on the Demise of Rich. Gwillym, the Jury on Not Guilty pleaded, found That T. Andrews was seised in Fee of the Tenements in Question ; That he had Issue Mary after married J. Gwillym, who had Issue Thomas, and he had Issue Thomas, who had Issue the Lessor ; That Thomas Andrews conveyed the Premises to the Use of himself and Eleanor his Wife for their Lives, Remainder to Mary Andrews his Daughter, and the Heirs of her Body by the said J. Gwillym, with other Rem' over. T. Andrews and his Wife died, and the said J. Gwillym and his Wife entred ; That they both died, and T. Guillym their Son entred ; That the Tenements are Parcel of the Mannor of Wormelow, which is ancient Demeſne ; That by the Custom there Fines founded on Writs of Right Close are levy'd in the Court of the Mannor ; That 29 May 1646. the said Thomas levied a Fine sur Concessit to three for their Lives, reserving a yearly Rent, but not the ancient Rent ; which Fine is said to be levied in placito Contentionis ; That Tho. Gwillym and his Wife June 24. C. 1. levied a Fine sur Cognufance le droit come ceo, &c. with Warranty to T. Marret and his Heirs, to the Use of the said T. Gwillym in Fee ; That T. Gwillym the Father 1 Nov. 24 C. 1. by Indenture enroll'd before a Justice

fo. 770.
Ejectment
on the De-
mise of Rich.
Gwillym.
Salk. 244. S.C.

Justice of the Peace, &c. convey'd the Premises to Tho. Payne the Defendant's Ancestor in Fee; That Tho. Gwillym died 20 June 1663. the said Tho. Gwillym, Jun. then being of the Age of 21 Years, who died, having Issue the Lessor; That the Survivor of the said three Lessees died 17 Sept. 1693. That thereupon the Defendant entred, and the Lessor (being of the Age of 21 Years) entred upon them. The Jury then found the Lease-Entry and Ouster. Et si, &c.

fo. 779.

This Case was twice argued by the Council of both Sides; and no Question was made, but that a Fine may be levied in a Court of ancient Demesne. But on the first Argument for the Plaintiff it was insisted, that the Fine *sur Concessit* in this Case was no Bar to the Entail; for no Fine before the Statute 4 H. 7. was a Bar; And that Statute makes the Fine with Proclamations only, to be a Bar of an Estate-Tail. Before that Statute a Fine was but a Discontinuance, and the Reason that it was a Discontinuance is, because the Fine is a Feoffment on Record; but the Fine in this Case being levied in a base Court, can't be call'd a Feoffment on Record, and consequently is no Discontinuance; and if the Fine was not any Bar or Discontinuance, then there is nothing in the Case whereby the Entry of the Plaintiff's Lessor can be toll'd. But admitting the Fine was a Discontinuance, yet it was but temporary, *viz.* during the three Lives mention'd in the Fine *sur Concessit*, and then on the Death of the Survivor of them (that being within twenty Years before the Action brought) the Entry of the Lessor is congeable, notwithstanding the Statute of Limitations.

On

On the last Argument for the Plaintiff, it was admitted, that the Fine *sur Concessit* was a Discontinuance ; but then it was insisted, that it was only temporary, and that it was determined by the Death of the surviving Lessee ; and to prove that *Litt. Sect. 620, 622.* was cited. It was also said, that this Case was not within the Words of the Statute of Limitations, which is that no Man should make any Entry into Lands, but within twenty Years after his Title accrued to him. But no Title of Entry was in the Lessor's Father ; so that to this Purpose no Laches was in him whereby the Lessor might be prejudic'd, but the Title of Entry first accrued to the Lessor himself by the Death of the surviving Lessee for Life, which was in the Year 1693. But admitting the Fact of the Case was within the Statute, and that the Title of Entry accrued to the Lessor's Father in his Life ; it was objected, that as this Special Verdict is, no Advantage can be taken of the Statute for that ; for by the Statute many Things are allow'd for Excuses for Non-Entry, as Infancy, &c. and then Entry may be made within twenty Years after such Impediments remov'd ; and for any thing that appears in the Special Verdict, the Lessor's Father was under some Impediment allowed by the Statute as an Excuse for his Non-Entry.

The Defendant's Council admitted that the Discontinuance was but temporary, *viz.* during the three Lives mentioned in the Fine *sur concessit*. But they notwithstanding insisted that the Entry of the Lessor was barr'd ; and for that the Case of *Sawle and Clarke, 1 Jones 208.* was cited ; which Case is also reported

reported 1 Cro. 156. by the Name of *Salvin* and *Clarke*, where the Case was as followeth: *Alexander Sydenham* being Tenant in Tail Male, Reversion in Fee to *John* his eldest Brother, made a Lease for three Lives, not warranted by the Statute; then a Fine with Proclamations was levied by *Alexander* to one *Taylor*, and then *Alexander* died without Issue Male, living the Lessee for Life. Five Years and more expired in the Life of *John*, after the Death of *Alexander*. *John* his Brother died without Issue; *Elizabeth* the Daughter and Heir of *Alexander* being Niece and Heir of *John*, the Lease for three Lives expired, and if *Elizabeth* was barr'd by this Fine and Non-Claim was the Question. And after many Arguments at the Bar, and after at the Bench, all the Judges were of Opinion that *Elizabeth* was barr'd. For when *John*, who had the Right at the Time of the Death of *Alexander* without Issue Male, had not prosecuted that Title, it is a Bar; and he shall not have any Advantage of Entry after the Death of Tenant for Life, because he had not any other Title after his Death than he had before; for his Title was by the Death of Tenant in Tail without Issue Male, and then he might have brought his *Formedon*; and when he doth not pursue his Title which first vested, he and his Heirs shall be barr'd, and they shall not have five Years after the Death of the Tenant for Life. Which Reason is agreeable to the Case in Question. For by the Death of *Thomas* the Lessor's Grandfather who made the Discontinuance, *Thomas* the Lessor's Father was entitled to his Action of *Formedon*, which he not having pursued his Laches will run to the Lessor's Prejudice

Prejudice, tho' he be an Infant ; and for that
vide Plow. 376. b. But the Court were of
 Opinion notwithstanding, that nothing ap-
 pear'd on the Record whereby the Entry of
 the Lessor was barr'd, and therefore Judg-
 ment was given for him. *Wright and Geers*
 for the Plaintiff, *Darnel and Lutwyche* for the
 Defendant. But a Writ of Error was brought,
 and the Judgment affirm'd by the Opinion
 of all the Judges of the *King's Bench*, who de-
 liver'd their Opinions *seriatim*, and the Points
 following were by them unanimously re-
 solved,

1. That a Fine may be levied of Lands in
 ancient Demesne in the Court of Ancient
 Demesne, notwithstanding the Stat' 18 E. 1.
vocat' Modus levandi Fines, which saith, that
 Fines shall be levied in C. B. & non alibi. For
 that Statute only takes away the Validity of
 Fines levied in Burrough Courts, or other
 Inferiour Courts, which was the Mischief
 intended to be prevented by that Statute,
 and doth not extend to Courts of Ancient
 Demesne ; for it would be unreasonable that
 they shall hinder the Levying of Fines in
 C. B. (which they may do by Writ of Dis-
 ceit) and yet can't levy Fines in their Courts
 of Ancient Demesne.

Fines may
 be levied in
 the Courts of
 Ancient De-
 mesne, but
 not in other
 Inferior
 Courts.

2. It was resolved, that such Fine levied
 in ancient Demesne made a Discontinuance,
 and had all the Effects of a Fine levied in
 C. B. save that it is no Bar, which is only by
 Force of the Statute of the 4 H. 7.

A Fine sur
 Cognusance,
 &c. for three
 Lives levied
 by Tenant in
 Tail in a
 Court of An-
 cient Demes-
 ne is no Bar.

3. That the Fine found in this Case is
 good, notwithstanding the Custom is found
 to levy Fines founded on a Writ of Right
 Close ; and the Fine levied is in *Placito Con-*
ventionis inter eos, &c. for it is found to be

Such Fine
 is good tho'
 it be in *Placito*
Convent' &c.
 and the Cu-
 stom to levy
 'em is on a
 Writ of
 Right Close.

X

secundum

secundum consuetud' Cur' and there is no Inconsistency between a Writ of Right Close and this Action of Covenant; for the Action of Covenant is not personal in this Case, but real *quod teneat convention' &c.* and not for Damages for Breach of the Covenant.

Such Fine is a Discontinuance only for the three Lives, and not in Fee, &c.

4. That the first Fine found, made a Discontinuance only for three Lives, and not a Discontinuance in Fee; notwithstanding the Conusors in the first part of the Fine acknowledged the Right to be to the Conusee, which (it was objected) implied Fee Simple, and notwithstanding the Warranty in the second Fine.

Tenant in Tail makes a Discontin' by making a Lease for 3 Lives, the Issue is barr'd of his *Formedon* by the Stat' &c. and after the Lease expires, he shall have 20 Years to make his Entry.

5. That the Plaintiff's Lessor is not barr'd by the Statute of 21 J. 1. of Limitations, although 20 Years were past after the Right of Action (*scil. Formedon*) accrued. For although he was barr'd of that Action after 20 Years past, yet he had Title of Entry only after the Discontinuance for three Lives was determined, and he shall have 20 Years for Entry after his Title of Entry accrued to him, which in this Case was by the Determination of the Lease for three Lives, and the time was within 20 Years before the Action brought. *Ex relatione alterius* as to the Resolutions in B. R.

Sleigh *versus* Metham.

Trin. 9 W. 3. Rot. 395. C. B.

fo. 782.
Ejectment on the Demise of *Frances Curtis*.

IN Ejectment for one Messuage and four Acres of Land in Nottingham, on the Demise of *Frances Curtis*, on Not Guilty pleaded, the Jury find, That *Joseph Curtis*, the Lessor's Husband

was

was seised in Fee of the Tenements in Question; and by Indenture between him of the First part, the Lessor then sole of the Second part, Bawdes and Hope of the Third part, in Consideration of a Marriage between him and the Lessor, covenanted, granted and agreed, for himself, his Heirs, Executors and Administrators, with the said Bawdes and Hope, their Heirs, &c. in Manner and Form following; that is to say, All that Messuage, &c. to the Use and Behoofe of the said Joseph Curtis for his natural Life; and after his Decease, to the Use of Frances (the Lessor) for her Life for Jointure, &c. They find also that the Marriage between Joseph Curtis and the Lessor was solemniz'd, and the Marriage-Portion paid, and that Joseph Curtis died 10 Jan. 1695. They find likewise the Lease-Entry and Ouster. Et si, &c.

This Case was first argued by *Birch* for the Plaintiff, and *Wright* the King's Serjeant for the Defendant.

fo. 789.

And *Birch* made one Question only, viz. If the Words in the Deed amounted to a Covenant to stand seised to the Uses in the Deed, or not?

And he said they were sufficient to that Purpose.

1. Here is a good and valuable Consideration, viz. Marriage and Marriage-Portion, and the Settlement of the Estate is for those Uses; and Uses are much of the same Nature with Wills, viz. to be guided and govern'd by the Intent of the Parties, and here was an Advantage intended by those Lands to the Wife, the now Lessor. Here is no Fine, nor Bargain and Sale, &c. And if the Deed doth not operate as a Covenant to stand seised, the Wife will be defeated of her

Jointure, and the Issue of her Body perhaps disinherited, and therefore it can't be intended a Settlement any other Way; and for that he cited *Scudamore* and *Crossing's Case*, 1 *Mod. Rep.* 178. *Vaughan's Rep.* 175, 176.

2. That the Words of the Deed ought to be so moulded, and such Construction made of them, that the Intent of the Parties should take Effect, if possible: And the Words [Covenant to stand seised to the Uses] are not of any absolute Necessity to create Uses. But it is sufficient if there be Words which *tantamount*, and no Conveyance admits of such Variety of Words as that of a Covenant to stand seised.

3. That the Judges have always endeavoured to support Deeds *ut res magis valeat quam pereat*.

fo. 790.

4. That every Man's Deed ought to be construed most strong against himself.

5. That the Words [covenant, grant, conclude and agree] sometimes amount to a Covenant to stand seised, and ought to be taken in such Sense, as will support the Intent of the Parties: and for that he cited *Lade* and *Baker's Case*, 2 *Ventr.* 261. *Adam's Case*, 2 *Cro.* 210. *The Lord Buckhurst's Case*, *Mo.* 519. *Carter* and *Ringstead's Case*, 3 *Cro.* 208. 3 *Leon. Case* 39. 1 *Inst.* 41. a. and *Gollard's Case*, *Popbam* 47, 48 and 49.

Wright Serjeant for the Defendant. He agreed all the Cases before put, and that the Words [grant, bargain and sell] would raise an Use to a Kinsman, according to *Crossing* and *Scudamore's Case*. But the Intent in that Case was to pass the Land by Conveyance at Common Law. The Words [covenant and agree] in this Case are Nonsense: for it

it doth not appear what was intended to be done, whether to levy a Fine, or to make a Bargain and Sale, &c. The Word [grant] will not raise an Use by way of Covenant, for here is a Limitation for Years to Strangers.

He agreed that the Intent of the Parties was the Foundation of Uses: But that Intent ought to have three Qualifications.

1. It ought to be made manifest out of the Words of the Deed. 2. It ought to be agreeable to the Rules of the Law. 3. It ought to be collected and taken on the entire Deed, 2 *Inst.* 672.

At another Day in another Term, the Case was argued again by the Council on both Sides.

And the Council for the Plaintiff now argued to the same Effect as before, and insisted on many of the Cases before-cited, and further cited *Walker* and *Hall's Case*, which is now reported in 2 *Lev.* 213. and *Osmer* and *Sheaf's Case*, which is now reported in 3 *Lev.* 370. by the Name of *Osman* and *Sheaf's Case*, which Case is entred *Trin. 5 W. & M. Rot.* 1487. in *C. B.* (which I have inserted, because it is omitted in 3 *Lev.*) and *Coultsman* and *Senhouse's Case*, which is now reported in *Poll.* 523. 2 *Lev.* 225. and is also reported, 2 *Jones* 103. He also insisted, that there was a Covenant in the Deed, That the Premises from time to time, and at all Times after, should remain, continue and be to the Uses, Intents and Purposes, &c. mention'd in the Deed; whereby it is manifest, that the Intent of the Parties was that this Deed should be a present Settlement of the Estate, which

can be by no other Way than a Covenant to stand seised.

Co. 791.

On the other Part it was argued, that there are no Words in this Deed whereby it can be collected, that it was the Intent of the Parties that the Uses should be created by way of Covenant to stand seised. The first Covenant in the Deed is the only Covenant which tends that way ; which Covenant is certainly defective in Words, and so defective that it is absolute Nonsense, and not to be reduc'd to Sense without the Addition of some Words to it ; for it is that the Covenantor for himself, his Heirs, Executors and Administrators, covenants, grants and agrees with the Trustees, their Heirs, Executors and Administrators, *in Manner and Form following, that is to say, All that Messuage, &c. to the Use and Behoof, &c.* But here is no Manner or Form express'd whereby this Deed should be executed, and no Man on the Words of the Deed can determine with any Manner of Certainty in what Manner it was intended to be executed ; for peradventure the Covenantor intended to execute it by Fine, Feoffment, Recovery, or any other way. And it is possible that he did not intend to perfect it before, but after the Marriage had, or the Marriage Portion paid, or other Condition precedent.

When a Deed is insufficient for want of Words, how is it possible for any Man to know whether he doth wrong or right when he takes upon him to make an Addition of Words to it ? The Intent of the Party is to be manifested only by the Words of his Mouth, or what he hath caused to be written.

It is frequently said in the Books, that the Law will mould, order, marshal and transpose Words to make them serviceable and useful to the Intent of the Parties; but it would be difficult for any Man to shew any Case where the Law ever permitted or allowed any Addition of Words to a Deed; for it is all one in Effect with an Averment *dehors* what was the Intent of the Parties, as *Cheney's Case*, Co. 5. is, and the Reason there given is, because the Construction of Wills ought to be collected out of the Words of the Wills in Writing.

And therefore it is said by the Lord *Anderson*, *Godbolt* 131. that if a Man devises his Land to the Heirs of J. S. and the Clerk writes the Devise to J. S. and his Heirs, that may be supplied by an Averment, because that the Intent of the Devisor is wrote and more. But if a Devise be to J. S. and his Heirs, and the Clerk writes to the Heirs of J. S. there no Averment will make it good, because it is not in Writing as the Statute requires; and as the Law now is, there is as great a Necessity that a Covenant to stand seised should be in Writing as a Devise.

In *Beale and Wyman's Case*, *Stiles* 240. three Judges were of Opinion, that the Will in that Case was *cæca*, and senseless, and *sicca*, because the Intent of the Testator could not be found by the Words of the Will. And in *Pitfield and Peirce's Case*, 2 *Rolls Abr.* 789. it is said, that it is inconvenient to make a Construction to pass Estates by general Words, without the usual Ceremonies of Law; *à multo fortiori* when there is a Defect of Words, on which a Construction may be made.

Ejectment.

So that on the whole Matter it seems that this Covenant is merely a personal, obligatory and executory Covenant, and not declaratory of any present Use ; and *eo potius*, for that the Covenant is for himself, his Heirs, Executors and Administrators ; and also because it is apparent, and without any Ambiguity or Doubt, that it was the Intent of the Parties that the Estates should be limited to the Trustees for the Purposes mentioned in the Deed ; which Intent would be entirely defeated, if the Deed should be construed to be a Covenant to stand seised, which would be contrary to the constant Rule and Declaration of Law in Exposition of Deeds as well as of Wills.

And as to the Objection that was made, that the Covenant that the Premises were free from Incumbrances, manifested the Intent of the Parties to be to raise a present Use ; it was said, that that was nothing to the Purpose, and that it was so resolved in the Case of *Barrington and Crane*, which is now reported in 3 *Lev.* 306.

As to the Case of *Ward and Lambert*, 3 *Cro.* 354. which was cited of the other side, that is not for the Plaintiff's Benefit ; for there it is adjudg'd, that a Bargain and Sale enroll'd for Money, will not raise any Use if the Money be not paid : But it was also held by the Court, that by apt Words an Use might have risen, *viz.* by a Covenant to stand seised.

And as to the Case of *Collard and Collard*, *Popham* 47. that can't be to any Purpose ; for the same Book saith, that the Judgment in that Case was after reversed.

And

And as to all the other Cases cited of the other side, this general Answer may suffice, That all the Resolutions in those Cases were founded on the Words in the Wills and the Deeds, and not on the Addition of Words to them; and therefore those Cases are very different from the Case in Question.

After in *Easter Term 1700*. Judgment was given for the Plaintiff by the Opinion of the whole Court; and their chief Reason was, because the Intent of the Parties was to make a present Settlement; and therefore they would supply the Deed with these Words *to be, or shall be*; and then the Covenant will run thus, *The Covenantor covenants, grants and agrees to and with the Trustees, &c. all that Messuage, &c. to be, or shall be to the Use, &c. And* Judgment was given accordingly. *Levinz* of Council with the Plaintiff, and *Lutwyche* with the Defendant on that last Argument.

A Deed defective in Words supplied by other Words to make it a good Covenant to stand seised.

Clarke *versus* Smith.

Hill. 10 & 11 W. 3. Rot. 1257. C. B.

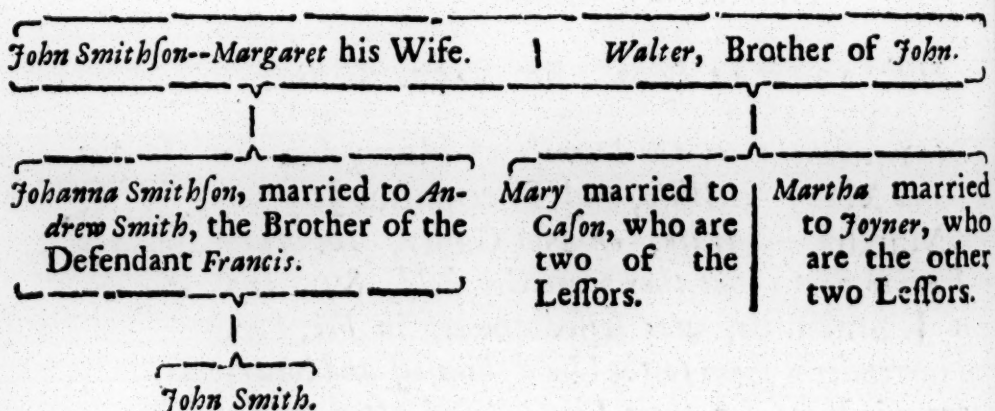
IN Ejectment on the Demise of Harry Cason and Mary his Wife, and Theophilus Joyner and Martha his Wife, on Not Guilty, the Jury find as to part, that they were Copyhold, &c. and that J. Smithson was seised thereof in Fee, &c. and surrender'd them to the Use of himself and Margaret his Wife for their Lives, and after to the Use of his Will, and in Default thereof to his right Heirs. That the said Smithson was seised in Fee of the Residue, &c. and that he had Issue Johanna his Daughter, who was married to Andrew Smith, who had Issue John Smith. That Johanna died in.

fo. 793.
Ejectment
on the De-
mise of Harry
Cason, & al.

in the Life of John Smithson her Father, and in the Life of John Smith her Son. That John Smithson devised the Copyhold to Margaret his Wife for Life, and after 6 Acres thereof to the Vicars of B. for ever, and also devised the Freehold Lands to his Wife for Life; and after her Decease he devised all (except the 6 Acres) to his next Heir at Law, and to his Heirs, provided that such Heir should pay 100 l. within 6 Months after the Decease of his Wife, as she should direct by her Will, and declared that the Estate should be charged with the said 100 l. That the Testator died, and his Wife died. That the said J. Smith, the Son of Johanna, was the Testator's Heir, and that he entred after the Decease of Margaret, and died without Issue. That the Defendant entred as Heir of the said John Smith on the part of his Father; and that the Women Lessors are Heirs on the part of J. Smith's Mother; and then found the Lease, Entry and Ouster. Et si &c.

fo. 797.

The Pedigree.



This Case was argued twice by Council on both sides; first in *Mich. 11 W. 3.* and after in *Hill.* next following. And the sole Question was, whether *John Smith*, the Grandson of

of the Testator, took the Lands by Discent, or by the Devise as a Purchasor: For if he took as a Purchasor, then the Defendant is his Uncle and Heir; but if by Discent, then *Mary* and *Martha* are his Heirs.

The Substance of the Argument for the Plaintiff was, That the Devise here was not any Limitation or Condition: No Limitation, because there is no Devise over; no Condition, because the Devise is to the Heir; and then the Condition is void, because there is no body to take Advantage thereof, and by Consequence the Payment of the Money is only a Charge in Equity on the Land. And for these Points these Cases were cited, *viz.* 3 Cro. 833. and 919. *Haynesworth* and *Prettye's* Case; 2 Cro. 592. *Pell* and *Browne's* Case; 3 Co. 20. b. *Wellock* and *Hamond's* Case; *Hob.* 29. *Counden* and *Clarke's* Case; *Stiles* 148. *Preston* and *Holmes's* Case.

On the other side it was said, that altho' the Payment of the Money was only a Charge on the Land, because there could be no Relief but in Equity, yet thereby a great Alteration is made as to the Estate in the Land. For when a Man takes Land by Discent he hath a pure, free, clear and absolute Estate by the Disposition of the Law: But here the Estate which the Heir hath, is by the Disposal of the Owner transmitted to him with a Charge and Clogg fixed to it, and which will adhere to it in whose Hands soever it shall come, till the Charge shall be satisfied; so that it comes to him in another Plight than he would have it by Discent. If he had it by Discent, then admitting that the Charge would be to the Value of the Land, and also that he was liable to the Payment

* *Quare* if
it should not
be 161.

Salk. 241.
p. 2.

ment of his Ancestors Debts of as great a Value, yet he shall be compelled to satisfy both, he having no means by Law to avoid either the one or the other: For he can't wave the Lands which are descended to him; and there is no avoiding of the Charge, for his Ancestor hath given it with such Clogg, and he hath an unavoidable Power of so doing, and therefore it would be unreasonable that the Law should adjudge those Lands to be Assets to satisfy Debts; and if they are not such Assets, then he hath them not by Discent, but as a Purchasor. And for Authorities in Point, the Case of *Gilpin*, 1 Cro. * 115. was cited, and also *Britton* and *Charnock's* Case, 2 Mod. Rep. 286. where it is held by North Chief Justice and Atkins Justice, that where an Heir takes by Will with a Charge, he takes not by Discent but by Purchase.

The Court at first were in some doubt, but at last they all unanimously agreed, that the Proviso in the Will for the Payment of the 100 l. was only a Charge in Equity on the Land, and made no Alteration in the Estate of the Land; and where the Estate is not alter'd, the Discent is not taken away. And it was also held, that if the Testator had devised a Rent-Charge, it had been all one.

And the Chief Justice said, that in all Cases of Executory Devises the Estate descends till the Contingencies happen. If a Man deviseth to A. 6 Months after his Decease, in the *mesne* Time the Land descends, and yet the Heir hath it not merely by the Law. And he said, that it would be a violent Construction to make the Heir in as a Purchasor, and that the Case of *Pitt* and *Pelham*,

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Pelham, 2 Jones 25. was a Case in Point. *Vide* the Case & *nota.* Judgment was given for Plaintiff, Easter 1700.

Eastcourt versus Weekes.

Trin. 10 W. 3. Rot. 35. C. B.

IN *Ejectment* for one Messuage and three Acres of Land in Newnton, on the Demise of Anne Eastcourt, on Not Guilty pleaded, the Jury find that the Tenements in Question are Copyhold, Parcel of the Mannor of Newnton, of which Will. Eastcourt was seised in Fee; That W. Eastcourt was seised in Fee of the Mannor, and W. Weekes was seised for Life of the Tenements in Question; That W. Eastcourt died seised of the Mannor, which descended to Amicia and the Lessor, his Sisters and Coheirs; That Will. Weekes permitted the Messuage, &c. to be ruinous, and 25 Nov. 1690. demised the Copyhold for one Year, and so for ten Years; That Amicia Eastcourt died, and her Moiety descended to the Lessor; That W. Weekes died seised, &c. 1 Feb. 1696. That there is a Custom within the Mannor, that the Wife of every customary Tenant dying seised for Life, shall hold, &c. *durante Viduitate sua*, &c. That the Lessor of the Plaintiff entred (for a Forfeiture, &c.) after the Death of W. Eastcourt, A. E. and W. W. That the Messuage at the Time of the Entry of the Lessor was out of Repair, but is now well repair'd, &c. Then they find the Lease Entry as Ouster by the Defendant as Servant to Elizabeth the Wife of W. Weekes, and that the said Eliz. is now alive, not married since the Death of her Husband. Et si, &c.

fo. 799.

Ejectment

on the De-

mise of Ann

Eastcourt. *S. C.*

1 Salk. 186.

In this Case, after several Arguments at the Bar, Judgment was given for the Defendant

fo. 802.

What Forfeitures are not a Determination of a Copyhold Estate.

What Forfeitures are descendable to the Heir of the Lord.

fo. 803.

dant by the Opinion of three of the Justices, viz. *Treby* Chief Justice, *Nevil* Justice, and *Blencow* Justice, chiefly on this Reason, That altho' the permissive Waste and the making of the Lease were Forfeitures, yet they were not such Forfeitures as determin'd the Copyhold Estate; and then it is in the Election of the Lord to take Advantage of the Forfeiture at that time, or not: But if he will not, his Heir shall not have such Election; and then the Election in this Case ought to have been executed in the Life of the other Coparcener; and no Entry can be for a Moiety, for they are but one Heir. The Cases on which the Court principally relied, were, the Case of *Cornwallis v. Horwood*, *Latch* 226. *Palm.* 416. *Ben. Select Cases* 148. *Cro. 2.* 301. *Lady Mountague's Case*.

But *Powel* Justice was of a contrary Opinion; and he said, that all Forfeitures at the Common Law were descendable to the Heir, but in the Case of Waste and the Case of *Cessavit*; but the Reason in the Case of Waste was, because before the Statute of *Glocester*, Damages were only recover'd in an Action of Waste, to which the Heir could not be entituled. And the Reason that an Heir shall not take Advantage of a Cesser in the Time of his Ancestor was, that the Tenant might tender the Arrearages at any time before Judgment, which the Heir could not have; see for that 2 *Inst.* 42. But in the Case of Coparceners the Aunt and Niece may join in an Action of Waste, *Co. Litt.* 53. b.

He said that the making the Lease for Years was a Disseisin at the Will of the Lord, *Blunden* and *Baugh's Case*, *Cro. Car.* 302. which

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he affirm'd to be good Law, altho' before that Case it was taken to be a Disseisin without any Regard to Election; and that such Forfeitures shall inure by way of Determination of the Estate, and operate as Breaches of Conditions annex to the Estate, *Godbolt 47. 1 Jones 249. Matthews v. Whetston, and 1 Cro. 233.*

He said he agreed with *Dodderidge in Cornwallis's Case, Palmer 416.* which is a Forfeiture at Election. But when an Election is coupled with an Interest, such Election is descendable, *Sir Rowland Hayward's Case, Co. 2.* An Election is descendable, or not, according to the Nature of the Thing; if it be merely personal it can't descend. Acceptance of Rent, or any other thing after the Estate is once forfeited, signifieth nothing.

When an Election shall descend.

He also said, that altho' the Lease in this Case was determin'd, yet Advantage might be taken of the Forfeiture; and that voluntary Waste was a Determination of the Estate, but not permissive, altho' it was now settled that permissive Waste was a Forfeiture.

He also said, that he inclin'd to be of Opinion that in the Case of permissive Waste, if the Waste was repair'd before Entry, that no Advantage cou'd be taken of the Forfeiture after.

He also urg'd, that the Mischief to Lords would be great, if the Elections in such Cases should not descend; for such Lease may be made where all the Timber on the Land may be fell'd within a small time before the Death of the then Lord, so that he may not have time to enter for the Forfeiture.

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He also said, that it was hard that the surviving Coparcener should lose the Advantage of the Forfeiture by the Act of God.

Note, The Chief Justice took a Difference when a Copyholder makes a Feoffment, or any other Act which is altogether inconsistent with his Estate, there the Copyhold Estate is absolutely determin'd, and Advantage thereof may be taken at any time, otherwise in the Case of making a Lease for Years; for the Copyholder remains a Copyholder notwithstanding such Lease, otherwise of a Lease for Life. But if the Copyholder will accept of a Lease for Years of another, that is a Determination of his Estate.

If the Aunt
and Niece
may join in
an Action of
Waste.

fo. 804.

He also said, that he much doubted the Case in *Co. Litt. 53. b.* Where it is said, that the Aunt and Niece may join in an Action of Waste, for all the Books there cited for it are to no purpose, except one, *viz. Br. Waste 41.* And he said, that that was a strange Case; for there two join in an Action of Waste where one of them can't recover for Part, *viz. Damages.* But the Resolution in that Case was only that the Right to recover Damages surviv'd; but in the Case here the Question is, whether the Right to recover the Land it self shall survive. Where there is such a Forfeiture by which the Copyhold Estate is determin'd, there the Forfeiture will go over, but other Forfeitures will not; for they are confin'd to the Persons in whose Times the Forfeitures were committed.

And as to the Objection made by *Powel Justice*, of the Prejudice that may happen to Lords, if their Heirs shall not take Advantage of Forfeitures, he said, that there was no such Mischief in that Case, and that the

the Lord's Bayliff might enter for the Forfeiture, and there is no Encouragement in the Case to make such Waste in Fees, for as soon as the Fees are fell'd, they are Chattels vested in the Lord, and his Executor may have an Action for them. And the same Objection might be made in the Case of Tenant for Life at Common Law. *Wright and Levinz* were of Council with the Plaintiff; *Lutwyche* and *Geere's* with the Defendant.

Robert Whalley *versus* Frances Reede
& Lowson Hall.

Trin. 8 W. 3. Rot. 1442. C. B.

IN Ejectment for two Messuages and one Acre of Land, on the Demise of William Mold & al' ^{fo 804.} Ejectment for two Houses and an Acre of Land on the Demise of Will. Mold, &c.

on Not guilty pleaded, the Jury found, That Francis Hall devised them after the Decease of his Mother to Frances his Wife during her Widowhood; or till such time as his eldest Son R. should attain his Age of 21 Years, and then to the said R. and his Heirs for ever, paying unto his Son L. and his Daughter I. 40 l. apiece; failing the said R. to come to his Son L. and his Heirs for ever, and failing his Son L. to come to his Daughter I. and her Heirs for ever; and failing R. L. and I. to come to his Brother W. and his Heirs for ever; That the Testator died 1 Mar. 1667. having Issue the said Reynold Hall his eldest Son, Lowson Hall, and Isabel Hall; That the Testator's Mother died; and the Testator's Wife entred, and five Years after the Death of the Testator took to Husband William Read; whereupon R. the Son entred, and by Lease and Release 11 & 12 July, 7 W. 3. conveyed to the

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the Lessors of the Plaintiff, whereupon they entred, &c. That the said R. the Son is yet alive ; That the several Sums of 40 l. were never paid, and that the said Reynold was never requested, &c. Et si super totam materiam &c.

fo. 809:

This Case was argued in *Easter-Term*, 11 *W. 3.* by the Council on both sides.

And the Plaintiff's Council made three Points.

1. If by any Words in the Will it appear'd to be the Testator's Intent that by the Non-Payment of the 40 l. by *Reynold* the Testator's eldest Son to *Lowson*, the Estate of *Reynold* should be determin'd, and thereby the Estate of *Lowson* should be actually vested in him.

2. Admitting that this Point should be against the Plaintiff, yet *Reynold* being the Testator's Heir at Law, ought to have had Notice of his Father's Will before any Determination of his Estate by the Will should ensue.

3. If the Entry of *Lowson* by reason of the Non-Payment of the 40 l. to him, was not barr'd by the Statute of Limitations, and whether the Plaintiff (as this Special Verdict is found) shall take Advantage thereof.

fo. 810.

The Case on the Will is but such : *Francis Hall* by his Will devised the Messuage in Question after the Decease of his Mother to *Frances* his Wife *durante viduitate sua*, or till such time as his eldest Son *Reynold* should come to the Age of 21 Years, and then to the said *Reynold* and his Heirs for ever, paying to his Son *Lowson* and his Daughter *Isabel* 40 l. apiece ; and failing the said *Reynold Hall*, to come to the said *Lowson* and his Heirs for ever ; and failing his said Son *Lowson*, to come to the said *Isabel* and her Heirs for ever ; and failing

failing his Sons *Reynold*, *Lowson* and *Ifabel*, to come to his Brother *John Hall* and his Heirs for ever.

And as to the first Point it was said, that the Word *paying* made only a Trust or Charge on the Messuage in Equity, because there was no Limitation over to *Lowson* for Default of Payment. And that in the Case of *Wellock* and *Hamond*, 3 Co. 20. The Word *paying* had been but a Trust or Charge on the Land, had there not been a younger Brother in that Case to take as special Heir for Default of Payment. And that in *Haynesworth* and *Prettie's* Case, 3 Cro. 833. there was an expresse Devise over for Nonpayment of the Money. And if the Word *paying* makes no Limitation of *Reynold's* Estate, then the Word *failing* makes none; for that can't be extended to failing in the Payment of the Money, because that Word *failing* is annex'd to the Devise to *Lowson*, and also to the Devise to *Ifabel*, and that if the Testator had intended that the failing in the Payment of the Money should be a Limitation of *Reynold's* Estate, he would have charged *Lowson* with the Payment of the 40 l. devised to *Ifabel* in the same Manner as he had limited the Estate of *Reynold* for Nonpayment of the 40 l. apiece to *Lowson* and *Ifabel*. But if the Nonpayment of the Money by *Reynold* should determine his Estate, and thereby the Devise to *Lowson* should take Effect in Possession, then *Ifabel* would lose the 40 l. devised to her, for *Lowson* is not charg'd with the Payment thereof, which would be against the Intent of the Testator; and therefore it would be more reasonable and agreeable to the Testator's

Cro. El. 204.
Pl. 39.

tor's Intent, to construe the Payment of the Money to be a Charge on the Land.

The Devise to *Isabel* is on the Failing of *Lowson*, and the Devise to *William* the Brother is on the Failing of *Isabel*, *Lowson* and *Reynold*; whereby it is apparent, that the Testator by the Word *failing* intended one and the same thing throughout, and consequently that he did not intend *failing* in the Payment of the Money, for *Lowson* and *Isabel* were not to pay any; and an uniform, congruous Exposition ought to be made of one and the same Word in one and the same Will.

fo. 811.
Exposition
of the Word
Failing.

And then the next Question will be, what the Intent of the Testator was by this Word *failing*. And as to that it was said, that by that Word he intended *dying*; for it is a common Expression in the *North* for *dying*, not only in Wills, but in Conveyances and common Parlance. And if the Word *failing* shall be taken for *dying*, then the Law in Favour of Wills will intend, that the Testator meant a dying without Heirs; for when he had devised the Messuage to *Reynold* his eldest Son and Heir, and to his Heirs, it shall not be construed that by the Death of *Reynold* he intended his dying having Issue of his Body, and so to disinherit the Heir by his eldest Son. And for that there is a direct Authority in 1 Cro. 185. *Spalding v. Spalding*. And then it is all one as if the Words of the Will had been, that if *Reynold* died without Heirs, then the Messuage to come to *Lowson*, and so from *Lowson* to *Isabel*, and from *Isabel* to *William* the Testator's Brother; and so one uniform and congruous Exposition would be made of one and the same Word in all the Parts of the Will,

Will, as there ought to be. And then if the Word *failing* shall be taken for *dying without Heir*, the Law in further favour of Wills will construe it, that the Testator intended a dying without Heir of his Body; for it is impossible that *Reynold* should die without Heir, Salk. 233. pl. 12. 238. P. 17. Cro. Car. 57. he having a Brother; or that *Lowson* should die without Heir, he having a Sister; or that *Isabel* should die without Heir, she having an Uncle, viz. her Father's Brother. And for that there is a direct Authority in *Cro. 2. 415. Webb. v. Hearing*; and with that agreeth *Parker and Parker's Case*, 2 *Lev. 70, 71*.

As to the second Point it was said, that *Reynold* had not forfeited his Estate, because it was not expressly found by the Verdict that he had any Notice of his Father's Will; for he being his Father's Heir at Law, had a better and more worthy Title as Heir than any other Estate which he could have by his Father's Will. And therefore the Law will not compel him to search whether he hath any other Estate than that which he might have by Discent from his Father, because the Law would then force him to search for that which would be to his Disadvantage; for without doubt the Estate by Devise would be a less Estate than that to which he was entitled as Heir, or an Estate with a Clogg and Charge: And therefore the Law with great Reason makes a Difference between him and a Stranger, because as he takes Notice of his Estate, so shall he take Notice of the Condition annex'd to it. And to prove that Point, the Case of *Fraunces, Co. 8. 92. 1 Mod. Rep. 86.* and 300. were cited.

And it was further said, that altho' the Jury had found Circumstances, which per-

fo. 812.

haps were a sufficient Ground for the Jury to find that *Reynold* had Notice, because he had not entred into the Messuage till after the Death of his Mother and Grandmother, yet that being a meer Matter of Fact proper to be determined by the Jury, the Court can't take upon them to determine it, no more than Matter of Fraud, or any other Matter of Fact.

Cro. Car. 576.

The Case of *Randal* and *Eely*, *Carter's Rep.* 170. seems to be, that Notice in that Case is not requisite. The Case there was, that a Man having four Sons devised his Lands to the eldest, and the Heirs Male of his Body, on Condition that if he should be married to a Woman not having a Portion of 1000 l. that then his other Sons should have the said Lands to them and their Heirs. The eldest Son married a Woman not having such Portion; and in that Case it was adjudged that he had forfeited his Estate, because no Notice was necessary to be given him. But, as it seems, that Resolution is founded on a Mistake of the full Resolution in the Case of *Fraunces*. For in the Case of *Fraunces* a Feoffment was made by the Father to the Use of his eldest Son, for 60 Years after the Death of his Father, if he should so long live, Remainder to *Thomas Fraunces* for Life, and after to the Heirs Male of his said eldest Son, with divers Remainders over; and in the said Deed of Feoffment there was a Proviso, that if the said eldest Son should disturb his Father's Executors (mentioned in the Will which he had made before the Deed of Feoffment) in taking the Goods which then were in the Father's House, &c. that then his Estates should cease. And it was resolved in

in that Case, that the eldest Son should not lose his Estates without Notice given him, as well of the Proviso in the said Deed of Feoffment, as of his Father's Will. But the Resolution in the said Case of *Randal* and *Eely* is founded on a Supposition, that the Reason of the Resolution in *Fraunces's* Case was only because the Heir had no Notice of the Will, which he ought to have had, because the Will was collateral to his Title in the Land. See also now the Case of *Malloon* and *Fitzgerald*, 3 *Mod. Rep.* 28. where and what Notice in such Cases is requisite.

As to the third Point it was insisted, that the Entry of *Lowson Hall* was not congealable (admitting that the other Points were against the Plaintiff) because it appears by the Verdict, that he hath not made any Entry into the Messuage in Question, within 20 Years after his Title of Entry accrued to him: For it is found by the Verdict, That the Testator died 1 *Mar.* 1667. That the Mother of the Testator died within five Years after his Death, and that *Frances* the Testator's Wife married within five Years after his Death, and that *Reynold* immediately thereupon entred in the said Messuage, and that he continued the Seisin thereof till the 12 of *July* 1695. 7 *W.* 3. and that then he by Lease and Release conveyed the Messuage to the Lessors of the Plaintiff, who entred, and made the Lease to the Plaintiff 1 *Apr.* 8 *W.* 3. 1696. and that after the same Day the Defendants entred upon him and ejected him. So that it appears that *Reynold* and the Lessors were in Possession for 23 Years and more: And then admitting that 2 Years was a reasonable Time for *Reynold* to

fo. 813.

pay the 40 *l.* apiece to *Lowson* and *Isabel*, yet there are 21 Years elapsed since the Title of Entry accrued to *Lowson*, and by Consequence he is barr'd by the Statute of Limitations, whereof the Plaintiff may take Advantage on this Special Verdict, as well as on Evidence; for if there had been any Disability in the Case to prevent the Operation of the Statute, it was incumbent on the Defendants to prove it, and to have procur'd it to be found in the Special Verdict, for no Disability shall be presum'd; but that not being done, the Plaintiff shall take Advantage of the Statute, as well as one shall have Advantage of a Bar by a Fine with Proclamations, if nothing on the other side be shewn to prevent it.

On the Defendant's Behalf it was urged, that whether the Estate devised to *Reynold* was an Estate Tail, or Fee, or for Life, the Word *paying* would make a Limitation of that Estate, because otherwise there would be no Remedy for the Money, and also that the Word *failing* would extend to all manner of Failings, *viz.* failing of Heirs and failing of Payment. But it rather implies an Estate for Life, than any other Estate. And as to Notice it was said, that if *Reynold* had entred immediately after the Death of his Father, there it could not be presum'd that he had any Notice of the Will; but when he did not enter for so long a time after, as in this Case, it is to be suppos'd that he had Notice of the Will, especially it being to be presum'd that he was more cognusant of his Father's Affairs than any other, and none other is obliged or appointed to give him Notice. And as to the Statute of Limitations,

tations, it was said, that no Advantage could be taken thereby, unless the Statute had been pleaded, or that the whole Matter touching it had been specially found by the Verdict.

Afterwards in *Trin. 11 W. 3.* Judgment was given for the Plaintiff, only for want of finding of Notice in the Special Verdict; for the whole Court was of Opinion that *Fraunces's* Case was good Law, and that the Case in Question differs not from it in Substance. But it was also resolved, that if Notice had been found, that the Estate of *Reynold* had been determined by the Nonpayment of the Money: And the Reason (as I apprehended) was, because the Word *failing* would extend as well to failing in Payment of the Money as to failing of Heirs or Issue of *Reynold*. The Court was also of Opinion that the Estate devised to *Reynold* was an Estate Tail, with Remainders in Tail to *Lowson* and *Isabel*, Remainder over in Fee to the Devisor's Brother, and that no Advantage was to be taken by the Statute of Limitations in regard that the whole Matter touching it was not specially found by the Verdict.

Broughton versus Langley.

Trin. 12 W. 3. Rot. 464. B. R.

IN *Ejectment* on the Demise of John Ramsden, on Not Guilty pleaded, the Jury found, That the Lessor's Grandfather devised the Tenements in Question unto John Stancliffe and Robert Ramsden and their Heirs; and by his Will declar'd, that they and their Heirs should stand seised thereof to the Uses, Intents and Purposes after specified,

fo 814.
Ejectment
on the De-
mise of J.
Ramsden.

fied, viz. 1. To permit George Ramsden his Son to receive the Rents, &c. for his Life, and after his Decease that they should stand seised to the Use of the Heirs of the Body of the said G. R. Remainder to two other Sons in Fee, &c. with a Proviso in the Will that the Trustees should have Power to make a Jointure to the Wife of G. R. That G. R. enter'd after the Death of the Testator, and by Recovery, &c. convey'd the Lands to the Use of himself in Fee, and afterward convey'd to A. L. and his Heirs; That G. R. is dead, and that the Lessor is the Heir of his Body and enter'd after his Death, and made the Lease to the Plaintiff. Et si, &c.

fo. 823.

What shall
be an Use ex-
ecuted and
not a Trust.

This Case was argued twice, and the sole Question was on the first Devise, whether the Estate in Law was vested in G. Ramsden by Force of the Statute 27 H. 8. c. 10. or that it was only a Trust for George Ramsden, and that the Estate in Law remain'd in George Staincliffe and Robert Ramsden; for if it was an Use executed in George Ramsden, then he was Tenant in Tail; the Devise being that he should take the Profits during his Life, the Remainder to the Use of the Heirs of his Body; and then the Recovery was well suffer'd.

It was argued for the Plaintiff, that the Estate in Law remain'd in the Trustees, and that it was only a Trust for G. R. and that (it was said) appear'd plainly to be the Devisor's Intent, for the Words are, that *they and the Survivor of them should stand seised, &c.* so that he intended such an Estate as might survive. There is also a Proviso that the Trustees should make a Jointure to the Wife of G. R. which they could not do, if the Estate did not continue in them.

More-

Moreover a Devise differs from a Deed in that Case : For if a Man makes a Feoffment without any Consideration to another and his Heirs, and doth not say to what Use, it shall be to the Use of the Feoffor and his Heirs ; but a Devise vests the Estate in the Devisee immediately, without saying to what Use, 4 Co. 4. in *Vernon's Case*. But 'twas agreed that a Devise might be to one to the Use of another, and the Use shall be executed if the Intent of the Devisor appears to be so, according to 1 Leon. 253. Pop. 4. But for a direct Authority that it shall not be executed as an Use in this Case, the Case of *Burket and Durdant*, 2 Vent. 311. was cited, where it was adjudg'd in the *Exchequer Chamber* that it was only a Trust not executed.

On the other side it was argued, that this Trust to permit one to take the Profits had been an Use before the Statute 27 H. 8. and therefore it shall be executed by that Stat', for an Use and a Trust at Common Law were all one. And in 1 Co. 121. in the Definition of an Use, it is said to be a Trust and Confidence ; that *Cestuy que Use* shall take the Profits, &c. and the Profits of the Land are all one with the Land it self. And as to the Objection, that the Intent of the Devisor was that the Use should not be executed, it was answer'd, that the Intent shall be observ'd in the Creation of an Use ; but when it is created it shall be govern'd by the Operation of the Law. And if in this Case the Devisor intended an Use, the Statute will execute the Possession to it. And for that 1 Ventris 379. was cited, where *Hale* Chief Justice put this Case : If a Man covenants to stand seised to the Use of himself for Life,
and

fo. 824.

and after to the Use of the Heirs Male of his Body, the Law will supervene his Intention, and make him Tenant in Tail. And as to the Objection, that Power is given to the Trustees to make a Jointure, it was answer'd, that that is consistent; for probably that was directed to prevent Indiscretion in the Marriage of G. R. for he made Provision that the Jointure should be made in Proportion to the Wife's Portion; and it is not inconsistent with the Estate Tail, for thereby the Estate Tail is preserved, and a Jointure may be made without docking it. And that Answer is given by *Hale* Chief Justice, to the same Objection in the Case of *King and Melling*, 1 *Ventr* 232.

And as to the Case of *Burchett and Durdant*, the Point in Question here was not necessary there to give that Judgment; for the principal Point was, whether the Words *Heir of the Body of A. now living*, was a good Name of Purchase to describe the Person; and it was resolved that it was a good Name of Purchase, and the other Point relating to the Trust was out of the Case.

In the principal Case the whole Court was of Opinion, that the Use was executed in G. R. for the Reasons before mention'd. And it was observed by the Court, that if the Use shall not be executed in G. R. immediately during his Life, the Remainder limited to the Use of the Heirs of his Body can't take Effect by way of an Use executed, which it ought of Necessity, for there is no Colour to make it a Trust for the Heirs of the Body of G. R.

And on the second Argument Judgment was given for the Defendant *per tot' Cur' Ex relatione alterius*.

ENTRY.

E N T R Y.

William Lord Sandys *versus* Edmund Bray.

Trin. 13 *El.* *Rot.* 1567. C. B.

COUNT in a Writ of Entry sur Disseisin, fo. 825.
 That Sir John Zouch was seised in Fee, &c. A Writ of
 and levied a Fine to the Bishop of L. and others, Entry in the
 and to the Heirs of the Bishop, Pasch. 11 H. 7. to Per.
 the Use of Sir Reginald Bray in Fee, who 11 H.
 7. devised the Use to Edmund Bray in Tail Male,
 Remainder to Margery the Wife of Sir W. Gau-
 dy in Tail General. That Sir Reginald Bray
 died, per quod the Conusees enter'd and died seised,
 whereby the Lands descended to L. Smith the Bi-
 shop's Heir. That Edmund Bray the Devisee in
 Tail of the Use, made a Feoffment in Fee to Sir
 W. Gascoigne and others, and died, having Issue
 John Lord Bray, who died without Issue Male.
 That after his Death one J. F. enter'd in the Name
 of L. S. the Heir of the Bishop to the Use of the De-
 mandant, Cousin and Heir of the Body of the said
 Margery, viz. &c. per quod the said L. S. was
 seised, &c. to the Use of the Demandant. That then
 the Statute of Uses was made, whereby the Deman-
 dant enter'd, and was seised, &c. till disseised by Sir
 E. B. who enfeoff'd the Tenant. Bar, Non dis-
 seisivit &c. and Issue thereupon. Spec' Verd'
 That J. F. 3 Eliz. enter'd into two Parcels of the
 Land in Question in the Name of all, and in the
 Name of the Heir of H. C. one of the Conusees in
 the Fine, if the said H. C. was the Survivor of the
 the said Conusees, and another such Entry in the
 Name of the Heir of the said Bishop of L. if the
 said

said Bishop of L. was the Survivor, and another Entry in the Name of the Heir of the said Bishop without the Words if he was the Survivor, and another Entry in the Name of the Heir of the Survivor of the said Conusees, and that they were all then dead. And if any of the said Entries was sufficient to invest the Freehold in any Heir of the said Conusees then having Right in the Tenements to the Use of the Demandant, was the Doubt of the Jury.

fo. 830.

All that which is before wrote of the said Record, I had from a M. S. of Warburton Justice.

At first I thought it was a strange Verdict, but then considering it was found on a Tryal at Bar, and that in that respect perhaps there was more in it than appeared to my View, I was desirous of knowing the Event thereof; and with great Search and Difficulty (in regard it did not appear by his Book in what County the Lands were, nor any Term or Roll in which the Record was entred) I found at last in the *Docket*, in the Office of Mr. Foley the second Prothonotary, that the Record was entred of *Trinity Term*, 13 *El. Rot.* 1229. That it was the same Term in which the Tryal at Bar was on an *alias ven' fac'* (which is altogether unusual, as I am informed by Practisers) but that *Docket* was mistaken in the Number Roll; for on further Search of the Records of that Term, the Record was entred *Rot.* 1567. and the County in the Margin of the Record is *Bedford*. And the Substance of the Residue of the said Record after that before wrote, here followeth.

fo. 831.

The Demandant, by the Consent of the Tenant, prayed a new *Venire facias* for the Insufficiency of the Verdict, which was granted, and on the Return thereof

thereof the Tenant confessed the Action, and thereupon Judgment was given for the Demandant, and an Habere facias seisinam awarded and return'd.

Holford *versus* Brome.

IN a Writ of Entry in le quibus in the Court of the County-Palatine of Chester, the Demandant counted on a Disseisin done to himself by the Tenant. Bar, that a common Recovery was suffered, &c. to the Use of Chr. Holford in Fee; that he died seised, and the Tenements descended to M. the Wife of Sir H. C. and they demised to the Tenant. Replic', that before the Recovery Tho. Holford and Jane his Wife, and the said Chr. Holford were seised in Fee, and levied a Fine to the Use of the said Tho. Holford for Life, Remainder to the said Chr. Holford in Tail Male, Remainder to the Demandant in Tail Male, Remainder to the said Tho. Holford in Tail Male, Remainder to the said Chr. in Fee; That the said T. Holford died, and the said Chr. enter'd, and by Indenture inroll'd, &c. bargain'd, &c. all his Estate to J. Bruen for the Life of the said C. Remainder to the Queen in Fee, on a Proviso to determine the said Bargain and Sale on Payment of 30 s. to the said J. B. or to the Use of the Queen, &c. whereby the said J. B. was seised of the Remainder, and being so seised the Recovery was had; That the said C. died without Issue, whereby the Queen was seised, and then the Demandant paid the 30 s. to Bruen, &c. and that the said Payment was found by Inquisition, and thereupon the Demandant brought his Monstrans de droit on the whole Matter aforesaid and obtain'd Judgment upon it, and

fo. 832.

A Writ of Entry in le quibus, in the Court of the County-Palatine of Chester.

and a Writ to the Chamberlain of Chester to command the Escheator to amove the Queen's Hands, which was done; whereupon the Demandant enter'd as in his said Remainder, and was seised till by the Tenant disseised. Rejoinder, that the Demandant before the making the said Indenture by him to the said J. B. bargain'd, &c. the Premisses to J. Warren for the Life of the said Chr. Remainder to the Queen in Fee, and she granted it to the said C. in Fee, whereby he was seised, &c. of the said Remainder; and he being so seised before the making of the said Indenture between the Demandant and the said J. B. enfeoffed the said Tenants in the Recovery, and then the said Recovery was had to the Use of the said C. in Fee, who died seised, and the Lands descended to the said Mary the Wife of the said Sir H. C. and they demised them to the now Tenant, prout in the Bar.

fo. 848.

This Precedent I had out of a Manuscript of Justice Warburton, and by the Record it self it appears that there was not any further Proceeding in this Case.

Note, By the making of the Deed of Bargain and Sale enroll'd by the Demandant George Holford (who was Tenant in Tail Male in Remainder after an Estate in Tail Male limited to Christopher Holford, to the said Bruen for the Life of Christopher, with Remainder in Fee to the Queen) the Intent was to prevent the said Christopher from barring the said Remainder of the said Geo. Holford. But for the Law in such Case vide 2 Co. 50. Sir Hugh Cholmondley's Case, which to that Purpose is the same in Effect with the Case here, whereby it is resolv'd that the Remainder to the Queen was void. But if a Remainder in Tail or in Fee expectant on an Estate Tail of the Gift of a Subject be well limited to the

the King, there a Recovery by the Tenant in Tail shall bar the Estate Tail; but shall not destroy the Remainder in Fee to the King. So if there be Tenant in Tail, Remainder in Tail to the King, Remainder in Fee to a Stranger, a Recovery suffered by the first Tenant in Tail shall bar the Estate Tail and the Remainder in Fee, yet the Estate of the King is not thereby touch'd. And so is 2 *Rolls Abr.* 393. and 394. *Tit. Recovery*, Let. A. Nu. 1, 2, 3. And that may be collected by the said Case of Sir Hugh Cholmondley, altho' that Point is not directly resolved in that Case. And for that *vide* also *Hob.* 339. *Litt. Rep.* 12. 3. *Mo.* 752.

fo. 849.

E R R O R.

Elizabeth Sleigh *versus* James Chetham, Margaret Ux' and Elizabeth Sleigh, in a Writ of Error on a Judgment given in C. B. against the Plaintiff Sleigh in Formedon in Remainder brought against her by the now Defendants.

Mich. 1 Ja. 2. Rot. 96.

fo. 849. D. Error on a Judgment in Formedon. Show. 20, 65. **E**RROR on a Judgment in C. B. in a Formedon in Remainder brought by two Coparceners and the Husband of one of them, in which they count on a Gift made by Sir Samuel Sleigh to the Use of himself for Life, Remainder to Samuel his eldest Son in Special Tail, Remainder to his said Son in General Tail, Remainder to Edward his second-Son in Tail Male Special, Remainder to Sir Samuel in Tail Male, Remainder to Samuel the Son in Fee, Descent to the Women, Demandants, Sisters and Heirs of Samuel the Son, &c. Plea in Abatement by a bis petitum. Demurrer with the Causes and Joinder. Judgment to answer over. Bar to Part, Non Tenure, and shews who is Tenant; to the other Part, Ne dona pas, &c. and Issue thereupon; to the Residue, that the said Samuel and Edward the Sons died without Issue Male, whereby Sir Samuel was seised in Tail, and levied a Fine, &c. to the Use of himself for Life, Remainder to the now Tenant for her Life, Remainder to the right Heirs of Sir Samuel. That Sir Samuel died seised, &c. and she enter'd, &c. and so demands Judgment if against such Fine, &c. Replic'

Replic' Issue on the Non Tenure, and as to the Residue, that the said Fine was to the Use of Sir Samuel in Fee, and that he devised to the Tenant and her Heirs, absque hoc, that the Fine was to the Uses alledged by the Tenant. Rejoinder, and Issue taken on the Traverse; Ven' fac' awarded, retornable Tres Trin. at which Day the Tenant causeth her self to be essoined de malo veniendi. Challenge thereof, because the Tenant hath an Attorney, &c. The Essoin and Challenge adjourn'd to Quinden. Hill. at which Day all the Parties appear, and the Tenant demurs to the Challenge. The Challenge adjudg'd good. Judgment for the Demandants to recover Seisin for the Default at the said Tres Trin. when the Essoin was cast.

There was great Variety of Proceedings on the Writ of Error before it came to be argued, which are worth Observation, for which *vide* the Record.

This Case was several times argued by Levinz Serjeant, and Treby then Attorney General, for the Plaintiff in Error; and by Powel then Serjeant, and Trinder Serjeant, for the Defendants.

fo. 860.

Two Errors were assign'd :

1. That the Plea in Abatement was not allow'd, but a *Respondeas Ouster* awarded.
2. That a *Petit Cape* ought to have been awarded, and not final Judgment.

As to the first it was said for the Plaintiff in Error, that the Plea in Abatement was good; for in real Actions, if the Writ demand the same thing twice, it is a good Cause of abating the Writ, and in that the Books are clear. And as to the Objection that it is not well pleaded, because it saith that six Messuages in *Etwall parcell' Tenementor' prad'* are Parcel of the Mannor of *Etwall*,

Z 2

there

there *parcell' Tenementor' præd'* shall be intended Parcel of the thirty-five Messuages, because the Mannor is certain by it self, and there is no need of shewing in what Vill it lies ; but here it saith the six Messuages in *Etwall*, which is one of the Vills where the thirty-five Messuages are supposed to lie, and therefore the six Messuages shall not be intended to be Parcel of the Mannor, but Parcel of the thirty-five Messuages.

But to that it was answer'd and resolv'd by the Court, that if the Plea had been well pleaded it had been a good Plea ; but it is not well pleaded, because it is not pleaded that the six Messuages are Parcel of the thirty-five Messuages, but *parcell' Tenement' præd'* and then the six Messuages may be construed to be Parcel of the Mannor as well as Parcel of the thirty-five Messuages.

As to the second Point these Authorities were cited, that a *Petit Cape* should be awarded, and not final Judgment, 21 E. 3. 27. b. 3 H. 4. 4. a. 6 H. 4. 22, 77. 1 E. 3. 1.

As to the Objection which may be made, that there being an Impar lance after Issue, and after an Adjournment, the Judgment is on the Default at the Impar lance Day, and not on the Essoin. To that 'twas answer'd, that a Departure after Impar lance is generally such a Contempt and Abuse, that Judgment final shall be given ; but when it is to a Day certain it is otherwise ; in the first Case the Tenant is always demandable, in the other not ; for it is in the Nature of a *Dies Datus est partibus*, Bro. Grand Cape 2, 13, 22.

fo. 860. D:

Relv. 211. But here the Tenant appears on the Impar lance, and says nothing to save his Default, and thereupon Judgment is given, and

and so no Default on the Imparlance, but on the Effoin; for the Effoin not being duly cast, that is a Default.

Obj. To what purpose wou'd it be to award *petit Cape* when the Tenant is in Court, and can say nothing to save his Default?

Resp. The *petit Cape* is to seise the Land into the King's Hands for the Contempt; but in the close thereof the Sheriff is commanded to warn the Party, tho' that is of Grace and Favour. 3 H. 4. 4. a. 11 H. 4. 72. 12. *Voucher* 86.

It was further said, that Judgment should not be final in this Case by reason of the great Privilege which the Law gives to Tenants in real Actions. In every Summons there ought to be fifteen Days between the summons and the Appearance, and if it be return'd *tardè* there ought to be nine Returns; and the Reason is, because the Law will not surprise Tenants in their Defence, but that they shou'd have convenient time to provide.

There was no Default in this Case till it was adjudged that the Effoin was not well cast; for when it appears that the Effoin cast is not maintainable, then it turns to a Default. 21 E. 3. 37, 45. 12 H. 4. 14. 11 H. 4. 1. then if thereby the Party was put out of Court, he ought to have been recalled by some Process.

It wou'd also be prejudicial to the Wife or the Reversioner who perhaps wou'd be reviv'd; for by this Judgment they are excluded and debarr'd. *Dy.* 103, 315, 341. and that a *petit Cape* ought to be awarded, 9 H. 5. 1. a. 1 Cro. 517. 2 *Jones* 412. 45 E. 3. 19. 41. 3 H. 4. 4. *Dy.* 24. b. were cited.

Obj. That the Tenant was call'd to save his Default, and said nothing to save it.

Resp. That she was not there to appear, but only to prosecute the Challenge, 7 H. 4. 14. a. This Case is not to be compar'd to a Default in a Writ of Right, where the Mife is join'd on the mere Right; for there greater Formality is required than where Issue is joyn'd on another Point, or on a collateral matter, for then a *petit Cape* shall be awarded. 1 Inst. 295. 10 H. 6. 7. 11 H. 7. 10. b. 38 E. 3. 18 b. F.N.B. Tit. Droit. Dy. 98. 39 H. 6. 16, 17. 12 H. 7. 10. Co. Lit. 294. Bro. Droit. 30. 48 Statbam Tit. Droit, *ad finem*. 4 H. 6. 28 a. 12 H. 6. 6.

fo. 861.

On the other Part it was said for the Defendants in Error, that Judgment final should be given in this Case for the Inconvenience that after the Demandant hath been at great Expence he should be put to Delay. And for that these Cases were cited, 2 Saun. 46. Fitz. Judgment 152, 145, 228, 257. 10 H. 6. 2. 3 H. 5. 5. F. N. B. 5 m. 11. b. Dy. 56, 98. 11 H. 7. 10. Litt. Sect. 514. Co. Litt. 295. b. and 5 Rep. 85. The last Resolution there in Penryn's Case is not Law; for Mo. 403. who reports the same Case, speaks nothing of it, 1 Bulst. 159, 160. 2 Cro. 35. Moreover the Default after Appearance, by the Ouster of the Challenge, was a Default *ab initio*, Fitz. Judgment 151, 152, 228, 245. 13 H. 4. 8. 10 H. 6. 2. Fitz. Droit 27. Bro. Droit 4. 57. Dy. 76. Co. Entr. 171. 2 Cro. 35.

If the Tenant had made Default at the Day of the Adjournment, a *Petit Cape* should be awarded; so if he had waved it, but when he insists on it, and puts the Court to Trouble, it shall be final, Fitz. Grand Cape 6.

6. 12. 45 E. 3. 14. Bro. Grand Cape 4. 21.
Ass. 17.

Also he can't assign the Death or Imprisonment of his Attorney; for he appears by the same Attorney that was at first, 2 Cro. 521. Mo. 712. Fitz. Essoin 16. 138. Bro. Essoin 42. So that a *Petit Cape* would be in vain, for he is estopp'd to say it by the Record.

Afterwards it was argued by *Somers* (then Solicitor General) for the Plaintiff in Error (but I know nothing of that Argument) and by Sir *Thomas Powis* for the Defendants in Error.

The Argument of Sir *T. Powis* was to this Effect.

He made two general Questions.

1. Whether the Challenge as to the Form thereof was sufficient.
2. Whether Judgment final ought to be given, or only a *Petit Cape* awarded.

As to the first, the Form of the Challenge is sufficient. The Objection is, that it ought to be averr'd that the Attorney was alive and not remov'd, and as to that there is equal Reason that it be averr'd that the Attorney was not *Languidus* or in Prison, &c. which are Causes of Essoin; but no such Entry was ever seen. And in such Entries where the Words *non amotus* are added, they are not necessary but superfluous; for the Words *habet Attornatum, &c. tantamount*. There are not any Resolutions in Point in this Matter, but it may be compared to the Case of a Fine; when that is pleaded there is no need of averring that the Conusor was not an Infant, Lunatick, &c. A Feoffment on Condition may be pleaded as absolute, and the Condition ought to be shewn of the

other Part. In Trespafs, if the Defendant justifies by Lease made before the Trespafs, he need not aver the Continuance of the Lease, for that shall be intended. Such foreign Matter of Disability and Impediment ought to be shewn and not to be intended, especially when it appears that the Tenant pleaded by the same Person, who, the Challenge saith, was the Attorney at that Time, and after the Challenge the Tenant appear'd by the same Person and demurr'd to the Challenge.

fo. 861. D. As to the second Point which hath been made, viz. whether final Judgment or a *Petit Cape* only ought to have been awarded: There is no final Judgment (which can properly be so called) that can be given on a Default in a real Action, unless in a Writ of Right, and that only after the Mise join'd on the mere Right; for if the Default be before the Mise join'd, the Judgment is only *quod petens recuperet seisinam suam & tenens in Mia'*. But if the Default be after the Mise join'd, then the Judgment is *quod petens recuperet seisinam suam tenend' sibi & Hæred' suis quiete de præd' Tenente & Hæred' suis in perpetuum*. And those two Judgments are very different; for if Judgment final be given, he hath no Remedy but by Writ of Error: But if Judgment be only by Default, then if he be Tenant in Fee he may have another Writ of Right, if Tenant for Life, &c. he may have a *quod ei deforceat per Stat' W. 2. c. 4.* all which appears by *Bracton, fo. 366. a. b. 2 Inst. 348. 350.* So that the Difficulty that the Words *Final Judgment* imply, ought not to affect this Case; and then the only Question is, whether a *Petit Cape* ought to have been awarded.

And

And as to that he observed this Method :

1. To shew what an Effoin is, what a Default, and what a Saving a Default.
2. That it would be unreasonable, vain and absurd, to have awarded a *Petit Cape* in this Case.
3. To shew some Authorities that the Judgment is well given.
4. To answer the Cases cited of the other Part.
5. To answer some Objections.

As to the first. An Effoin is an Excuse for the Non-Appearance at a Day, which without such Excuse would be a Default; but if on Examination the Excuse fail, then that is a Default. Effoin,
quid?

A Default is legally taken for a Non-Appearance in Court, 1 *Inst.* 259. b. But there are diverse Sorts of Non-Appearances. One is on the Return of the Summons, and then a *Grand Cape* issueth, commanding the Sheriff *capere in manus nostras per visum legalium hom'* &c. and then there is a Clause commanding the Sheriff to summon the Tenant *quod sit coram Justiciariis, &c. tali die sicut summonitus fuit*. There is also a Non-Appearance at a Day after that the Tenant hath once appeared to the Action; and that is with an Effoin, or without it: If it be without an Effoin, then a *Petit Cape* shall issue, commanding the Sheriff *capere in manus nostras un' Messuag' &c.* without the Words *visum legalium hom'* and then there is a Command therein to summon the Tenant to appear at a certain Day *ad audiend' Judicium suum*; but it is not any Summons to shew Cause why he made Default,
quid?

made Default at the other Day, as in the *Grand Cape*. This is the Difference between the two Writs, as appeareth by the Register, *Bracton*, &c. altho' some of the Books say, that the *Petit Cape* is to summon the Tenant to answer to his Default, but there are no Words in the Writ for that purpose, as there are in the *Grand Cape*.

And the Reason of this Difference seems to be, that when the Tenant hath once appeared, it is presum'd that he knew how the Action proceeded against him, better than he who had never appeared, and therefore the Law doth not treat him so favourably.

If there be a Non-Appearance after the Tenant hath appeared, and an Effoin is cast for him, if it be not challeng'd, there is always a Day given to the Demandant and Tenant, and the Entry is *habet talem diem per Effoniam suam*: But if it be challeng'd, then the Effoin with the Challenge is either adjudg'd or adjourn'd, and a Day given to the Parties.

Saving a
Default, quid?

A Saving a Default is, when one hath fail'd to appear at a Day, and then comes on Process or without Process (as he may) at another Day, and shews a true and an allowable Excuse.

How the
Proceedings
are on an Ef-
foin cast in
real Actions.

It is to be confess'd, that when there is a Non-Appearance without any Effoin cast, that there ought to be Process before Judgment can be given for the Demandant, unless the Non-Appearance be after Issue join'd. Also where an Effoin is cast, whether it be challeng'd or not, if on the Day given on the Effoin the Tenant doth not appear, Process ought to be awarded against him, because

cause perhaps he may excuse both the Non-Appearances; and that in all Cases which are not before excepted.

But where an *Essoin* is challeng'd and adjourn'd, and a Day given to the Parties, and the Tenant at that Day appeareth, and doth not maintain his *Essoin*; or demur to the Challenge, and it is adjudg'd against him; there none other Process ought to be awarded against him, but Judgment of Seisin ought to be given. And in no Case with these Circumstances a *Petit Cape* was ever awarded.

And now according to the Order first proposed, it is to be shewn that it would be unreasonable, vain and absurd to have granted a *Petit Cape* in this Case.

It would be unreasonable to have granted it after so long a Delay after an *Essoin* cast, contrary to a Multitude of Resolutions in the Books ancient and modern; *imò*, contrary to the plain and express Words of the Stat' 12 E. 2. *de Essoiniis*, whereby it is declared, that no *Essoin* lieth if the Party hath an Attorney in the Suit.

Moreover it is after Issue join'd, and notwithstanding when she had an Opportunity of excusing her Delay on Appearance at the next Day, then, in lieu of excusing her self, she demurs to the Challenge, which was good without Doubt; all which was an apparent and frivolous Delay.

fo. 862 D.

Also the *Petit Cape* is only to give the Party an Opportunity of excusing the Default; and it can't be presum'd that she had any Excuse in this Case, because she shew'd no Excuse when she had an Opportunity.

The

The Tenant in this Case should have had the Benefit of a *Petit Cape*, had not she herself prevented it by the *Essoin* cast without Cause, and by her Appearance at the Day given on the *Essoin*, and Demurrer to the Challenge, whereby she put her self on the Judgment of the Court.

Moreover it is to be presum'd, that when she demurr'd to the Challenge, she did all she could to excuse her Non-Appearance; and then to admit her to make another Excuse is not reasonable, when she had put it on the first.

2. It would have been vain to have granted a *Petit Cape*; for if it had been awarded, the Tenant could have said nothing at the Return thereof in this Case, but that her Attorney was dead, remov'd, or in Prison: But she hath confess'd all that to be otherwise, by her Demurrer to the Challenge; for the Words of the Challenge are, that the Tenant *habet Attornatum in Placito præd'* then she demurring to that Challenge confess'd it.

Obj. But it hath been objected, that she was not in Court for that Purpose to save her Default, but only to answer to the Challenge, and therefore other Process ought to issue.

Resp. The *Essoin* cast was such that it could not be adjudged at the Day on which it was cast, because the Tenant might shew some good Cause to maintain the *Essoin*; and therefore there was a Necessity for adjourning the *Essoin*, and giving another Day to the Parties, to the Intent she should have an Opportunity of saving her Default. And so is 12 H. 4. 14. and 14 H. 4. 6. And if no Day had been given, it had been Error, 2 R. 3.

Fo.

fo. 36. And that Day is given for no other Purpose, but that the Tenant should have an Opportunity to save his Default.

According thereunto the Tenant in this Case had a Day given her, and at that Day she appeared by her Attorney and demurr'd to the Challenge, and consequently she then appeared to save her Default; for if the Demurrer had been adjudged good, she had sav'd her Default.

3. It had been absurd to have awarded a *Petit Cape* in this Case; for it appears that the Tenant appeared by Attorney in the same Term wherein Judgment was given; wherefore it is impossible that she should make Default in the same Term, because the whole Term is but one Day in Law, and therefore no *Petit Cape* ought to issue, but Judgment of Seisin, 7 H. 4. 19. a. Bro. Tit. Default 18. For by the *Petit Cape* it is always suppos'd that the Party is out of Court, when in Truth the Tenant in this Case was in Court, and therefore it would be absurd to award a *Petit Cape*, as it is said by Saunders Chief Justice in *Williams* and *Grames's* Case, 2 Saun. 45. which Case, as to this Purpose, is the same with the Case in Question.

3. There are diverse Authorities and Resolutions in Cases of Defaults before Issue, which may be compared to the Case in Question. 12 H. 4. 14. b. It is resolved *per tot' Cur'* that if a Tenant in a real Action before Appearance be effoined of the Service of the King, and makes Default at the next Day, a *Grand Cape* shall be awarded, because he may save his Default; but if he appears and doth not shew his Warrant, he shall lose the Land.

14 H. 4. 12. In a *Quare impedit* the Plaintiff was effoined, which was challeng'd, because the Plaintiff had an Attorney in the Plea. *Hankford* in that Case gave the Rule in this Manner: Your Challenge shall be enter'd, and then at the Day which the Demandant hath by the Effoin, you shall shew the Matter, and if it be found, you shall have a Writ to the Bishop; for now it is proper that the Effoin be adjourn'd, because perhaps the Attorney is removed; and the Law is the same on the Part of the Tenant or Defendant.

21 Aff. Pl. 17. In a *Formedon*, the Case is long, but it is the same with the Case in Question, save only there is no Demurrer nor Issue: And in that Case, altho' it was objected that the Tenant had made only one Default, yet in regard he appear'd at the Day given by the Effoin, and it was found that he had an Attorney, and he was in Court and could not save his Default, it was resolved that Seisin of the Land should be awarded.

And that was on a Writ of Error, which makes the Authority more strong; and if it shall be so on a Default before Issue join'd, *à multo fortiori* it ought to be so after Issue join'd.

And for Authorities that Judgment final shall be given for a common Default after the Mise join'd, there is a Multitude of Authorities. 13 H. 4. 8. b. 3 H. 6. 2. 9 E. 4. 34. Bro. Tit. Droit 7. Tit. Judgment 151, 152, 228, 245, 252. Fitz. Judgment 99, 129, 141, 154, 163, 196. Dy. 98, 103. besides the Opinion of the Lord Coke, 1 Inst. 295. contrary to *Penryn's* Case, Co. 5. 85. b.

But

But the Case in Question is more strong; for this Case is not only after Issue join'd, but after an Effoin and a Challenge to that Effoin, and a Demurrer to that Challenge, which hath been over-rul'd by the Judgment of the Court; so that there hath been all the Solemnity for the saving of that Default that could be.

And from the Resolutions in Case of a Writ of Right, it may be collected, that if Judgment may be given on a Non-appearance after the Mise join'd in a Writ of Right, which is the most fatal and peremptory Judgment, against which there is no Remedy but by Writ of Error (as is before shewn) *à multo fortiori* after an Issue join'd in an Action, which is not so fatal, by reason that there is Remedy against such Judgment by another Action. fo. 863. D.

And for other Authorities that this Judgment is well given,

There is 2 Cro. 35. Willoughby and Egerton's Case, where in a *Formedon* brought in *Chester*, the Tenant after Issue join'd on the Return of the *Ven' fa'* did not appear, and Judgment of Seisin was there given; on a Writ of Error, Exception was taken to the Judgment, because it was not *quod recuperet per defaultam*, but the Exception was over-rul'd and the Judgment affirm'd.

In the Register of Original Writs, fo. 114. a. if a Tenant in a *Præcipe quod reddat* (which is not a Writ of Right, and therefore the same with the Case in Question) be effoin'd, and the Demandant and his Attorney by Covin between them, cause an Entry on Record to be made that the Tenant hath an Attorney, by reason whereof the Effoin is chal- If the Tenant casts an Effoin and the Demandant and his Attorney by Fraud cause an Entry to be made that the Tenant hath an Attorney, &c. a Writ of Disceit lies.

challeng'd; and being found so, Judgment of Seisin is given against the Tenant at the Day given by the Effoin. For this Disceit and Practice the Tenant shall have a Writ of Disceit, the Form of which is in the Register *ubi supra*, and in *F. N. B.* 99. and that is a plain Authority that the Judgment in this Case is well given; for from this Writ it may be inferr'd, that Judgment of Seisin in such Case is well given; for if it be Erroneous, then the ordinary Remedy by Writ of Error had been sufficient, and the Writ of Error had been as effectual as the Writ of Disceit, as appears by the Judgments in *Rast. Tit. Disceit*. But final Judgment ought of Necessity to be given in that Case in the Register, because it appear'd by the Record that he who effoin'd himself had an Attorney: But because he really had no Attorney, but a Warrant of Attorney was fraudulently fill'd by the Demandant, and therefore the Tenant had lost his Land, for that Reason the said Writ of Disceit was fram'd for his Remedy.

As to the Authorities cited on the other Part, all the Cases which make no mention of Effoins cast, Challenge and Over-ruling, may be admitted. And so also of any Cases where *Grand* or *Petit Cape* hath issued without Debate, because pass'd *sub silentio*; But the two first Cases in *1 E. 3.* which are cited against the Judgment, are directly for it.

The first is, that after the Mise join'd in a Writ of Right, the Action was discontinued by the Demise of the King. On the Resummons the Tenant made a common Default, and thereupon a *Grand Cape* was awarded, as it ought to be; for the Resummons only re-

vives

vives the first Original, and then it was only as a Default at the Return of the Original, but the Book precedes in this Manner; *And it was said, that after the Mise join'd a Petit Cape shall issue*: But by whom it was said, *non constat*. But notwithstanding, the Case in the Close saith that it had been otherwise used, because the Demandant on such Default shall have Seisin.

The next Case in 1 E. 3. cited on the other side is express, that if before Appearance an Effoin is cast and challeng'd because the Tenant hath an Attorney, and at the Day of the Adjournment the Tenant doth not appear, that a *Grand Cape* shall issue (which may be admitted.) But, as the Book further saith, if the Tenant then appeareth and can't save his Default, he shall lose the Land, and that is an express Authority on our side.

The Case of 3 H. 4. hath been also cited of the other side. In a Writ of Dower the Tenant vouch'd, and at the Return of *sequatur sub suo periculo* the Tenant is effoin'd, and at the Day given by the Effoin the Tenant made Default, There it was said by the Demandant's Council, that the Tenant could not save his Default, and yet only a *Petit Cape* was awarded. But there is no Reason for such Resolution. But notwithstanding, that Case doth not make against the Case in Question. For it appears by 45 E. 3. 19. pl. 19. and 11 H. 4. 72. and *Kelway* 41. that when the Tenant in such Cases appears, the Demandant shall have Judgment against him; and in our Case there was an Appearance after the first Default, and so there is a Difference between the Cases.

A a

The

The Case of 9 H. 5. 12. doth not affect this Case, for the Dispute there was only whether an Effoin cast for a Tenant after Issue join'd in *dum fuit infra etatem* came in due time, and to advise thereof the Court adjourn'd the Matter of Debate, and at the Day of the Adjournment the Court quash'd the Effoin and awarded a *Petit Cape*, and well; for *Westbury* of Council with the Demandant pray'd only a *Petit Cape*, and he not praying more it was not Error to grant it.

The Case of 11 H. 4. 87. is of small Authority to this Purpose; for it is in Effect no more than if in a *Formedon* an Effoin is cast for one as Attorney of the Tenant where another is his Attorney, that in that Case the Effoin shall be adjourn'd, but not adjudg'd (which is agreed.) And true it is that *Thirning* said further, that if at the next Day it be found that the Tenant had another Attorney, that should turn to a Default, and that a *Petit Cape* should issue; but nevertheless the Case further saith that, for Doubt, the Attorney who was effoin'd now appear'd and demanded the View.

fo. 864.D.

And there is a material Difference between this Case and all the Cases cited of the other side in Respect of the Demurrer in this Case.

As to the Objections made by the other side.

Obj. It hath been objected, that there was no Default in the Tenant till it was adjudg'd a Default, and thereby the Party was put out of Court, and therefore ought to be recall'd by Process.

Resp. It is to be agreed, that when the Court hath adjudg'd the Effoin to be insufficient, the

the Tenant is put out of Court, but *non sequitur* that he ought to be recall'd; for when the Effoin was adjudg'd insufficient, in the Judgment of the Law she hath made an inexcusable Default on the Day in which the Effoin was cast, and Judgment is to be given as on a Default at that Day, and so is the Judgment given in this Case.

Moreover, if that be a Reason wherefore Process shall issue, that Reason will serve *in infinitum*; for if on Process the Tenant comes and shews no Cause to save his Default, he is thereby put out of Court, and then by the same Reason new Process shall issue: and it would be very absurd for a Court to put the Tenant out of Court for a Default, and immediately by Process to recall him.

Obj. It hath been also said, that the Tenant appear'd at the Day given on the Effoin, and therefore she can't be said to make Default.

Resp. But the Answer to that is, that the Appearance of the Tenant then was of none Effect, but only to entitle the Demandant to Judgment. For it is to be confess'd that if she had not appear'd, Judgment ought to be stay'd till Process had issued on that Return.

Obj. The great Favour also that the Law shews to Persons in the Possession of their Inheritances hath been urg'd by the other side, and that the Law hath provided sundry Fences and Guards for it.

Resp. As to that it ought to be confess'd, that in ancient Time many and great Delays were allow'd to Tenants in real Actions, but such ill Use was made thereof, that the Delay of Justice thereby became infinite, as (for Instance in one) by Fourcher by Effoin,

and therefore fundry Statutes have been made to abridge and restrain them.

But be it so or not, the Favour that the Tenant now claims was never allow'd, and therefore the Court will not institute a new Delay; for Delays have always been discourag'd by the Judges, 2 *Inst.* fo. 137.

Obj. Another Objection which hath been made, is, that if this Judgment shall stand, it will be very prejudicial to him in the Reversion, who will thereby be debarr'd from defending his Title.

Resp. It appears not to this Court that there is any Reversioner to be received, for the Point in Question by the Issue, is, whether the Fine levied by Sir Samuel Sleigh was to the Use of the Tenant for her Life, Remainder to Sir Samuel in Fee, or only to the Use of Sir Samuel in Fee. But admitting it appear'd that the Tenant had only an Estate for Life, yet that doth not vitiate the Judgment; for it appears that the Demandants are Heirs of the Reversion in Fee: But if it should not be so, it was the Folly of the Tenant that she would not introduce the Reversioner by Aid Prayer, and it was the Folly of the Reversioner also that he would not come in voluntarily and pray to be receiv'd. Moreover it was not in the Power of the Demandants to compel him to be receiv'd; but however the Prejudice is not very great, for when his Reversion comes into Possession, he hath Remedy by another Action.

When and
how a Tenant
may plead
*quod nunquam
fecit se Effoni-
ari.*

And so he, having pursu'd the Method proposed in the beginning of his Argument, pray'd that the Judgment given in *C. B.* should be affirm'd. And the Judgment was affirm'd by the whole Court, and the principal

principal Reason was, that when the Tenant had cast an Effoin, and that is challeng'd, and there is a Demurrer thereto, the Tenant hath affirmed and avowed it, and that being turn'd to a Default, that Default after Appearance is peremptory ; but forasmuch as an Effoin may be cast by a Stranger, if the Case had been such, the Tenant ought to have disavow'd and averr'd *quod nunquam fecit se Essonari*, Co. Entr. 225. 14 H. 4. 14. 12 H. 4. 14. So the Mischief of a great Delay was a great Motive to the Court in their Judgment.

Hodges versus Nicholas, in a Writ of Error in the Exchequer-Chamber on a Judgment in B. R. for Nicholas Plaintiff v. Hodges Defendant.

Pasch. 34 C. 2. Rot. 379. B. R.

THE Plaintiff declares quod cum Testat' exist' by Articles mention'd to be made between him and the Defendant Hodges and Mary his Wife, that it was agreed that the Plaintiff and Mary Hodges should carry on and manage the Trade of a Man's Taylor for Four Years, if they should so long live, in the House then in the Possession of the said Hodges and his Wife ; That the Partners should have the Use of certain Parts of the Defendant Hodges's House ; That Hodges and his Wife should not sollicite any Customers for their Custom after the Expiration of the four Years, and that they should not work for them, &c. That they should use their Endeavour to transfer the Customers to the Plaintiff Nicholas ; That the one should not

fo. 865.
Narr'on Ar-
ticles of Co-
partnership.

detain from the other the Books of Accompt; and that no Debt should be contracted by one Party without the Consent of the other. Breach, That the Defendant Hodges and his Wife did not permit the Plaintiff to exercise the Trade in the said House. 2. That the Defendant and his Wife did not permit the Plaintiff to have the Use of the Shop, &c. 3. That the Defendant and his Wife after the Expiration of the four Years solicited Charles Lord Herbert and diverse other Customers for their Custom. 4. That the Defendant and his Wife had work'd for Charles Lord Herbert, &c. 5. That the Defendant and his Wife after the four Years had not used their Endeavour to transfer to the Plaintiff the Customers, &c. but he had lost several by the Defendant's Procurement. 6, 7, 8. That the Defendant's Wife within the four Years, &c. took out of the Plaintiff's Possession diverse Books in particular relating to the Trade, &c. and had refused to deliver them to the Plaintiff on request to have them perused, &c. 9. That the Defendant had contracted such a Debt without the Plaintiff's Consent, and that the Defendant was sued and confess'd the Action, and the Plaintiff's Goods were taken in Execution. Bar to the 1st Breach, That the Defendant and his Wife non impediver' the Plaintiff and Issue thereupon. To the 2d, That they did not deny to permit the Plaintiff to have the Use of the Shop, &c. and Issue upon that. To the 3d, The Defendant denied it and offer'd an Issue, &c. and there is a Demurrer to it. To the 4th, He denied it, and there is a Demurrer thereto. To the 5th, That he and his Wife were never requested, &c. and that they did not divert any Customers, &c. and Issue upon that. To the 6th, 7th, and 8th, That the Plaintiff from time to time, &c. had and might have had the Inspection of the Books, &c. and there is a Demurrer thereto. To the 9th, That the She-

riff did not enter into any Part of the Plaintiff's House nor took his Goods, &c. and Issue upon that.

These Exceptions were taken by Levinz of Council with the Plaintiff in the Writ of Error.

fo. 877.

1. That there is no exprefs Averment that the Articles were made between the Parties nam'd therein, because it is said in the beginning of the Declaration, That by Articles *mentionat' fore fact' &c.* And the *Testat' existit* that the Defendant covenanted, is not sufficient, it not being alledg'd that they were made between the Parties.

2. That the Defendant and his Wife covenanted, &c. and Breaches are assign'd on some of the Covenants in which the Wife covenanted, and her Covenant is void.

3. That the Breach that the Defendant had hinder'd him to use his Trade in the House without shewing how, is not sufficient; but it ought to be shewn how he was hinder'd.

4. That on the Covenant that they would not contract Debts without mutual Consent, a Breach is assign'd that *Hodges* had contracted a Debt of 100 l. with one *Humes*, and that he had Judgment and Execution against *Hodges*, and that the Sheriff by Virtue thereof, and by the Instance of *Hodges* enter'd into his House, and levied and took divers of his proper Goods, and joint Damages are given for that Breach with others, whereas no Damages ought to be given for it, because there is not any Breach within the Intent of the Covenant; for the Plaintiff hath his Remedy for it by Way of Action of Trespass, and then to have Remedy on that Covenant for a thing so remote, was hard and unrea-

fo. 877. D.

sonable; but all the said Exceptions were over-rul'd and the Judgment was affirm'd.

But for the better Apprehension of the Grounds of the Demurrer, the Record being prolix, I will put the Matter together which concerns it.

1. And first the Demurrer is to the Plea to the third Breach assign'd in the Declaration, which is thus assign'd, *viz.* that the Defendant and the said *Mary* his Wife after the said four Years, &c. had solicited *Charles Lord Herbert* and others, who were Customers during the Copartnership, for their Custom, &c. To which the Defendant pleaded, that he, or the said *Mary*, at any time after the Expiration of the said Copartnership, *non sollicitaverunt nec eorum alter sollicitavit* the said *Charles Lord Herbert vel aliquas personas quascunq; &c.* prout in the Breach; and altho' the Words of the Plea are different from those mention'd in the Breach assign'd, yet Judgment was given for the Defendant as to that.

2. The Demurrer is also to the Plea to the fourth Breach assign'd, which is, that the Defendant and the said *Mary*, after the said four Years, had work'd for *Charles Lord Herbert* and divers others who were Customers of the Plaintiff and the said *Mary*, during the Copartnership.

To which the Defendant (having as before denied the Solicitation of any Customers, &c.) saith as followeth; *Nec pro aliquo hujusmodi Custumar' &c. ex Intercessione vel Sollicitatione ipsorum Daniel' & Mariæ vel eorum alicujus quovismodo operat' vel negociat' fuerunt in confecti-one Vestium vel Vestiment' pro aliquo hujusmodi Custumar' & de hoc &c.* But no *similiter* is enter'd.

ter'd. And altho' the Words of the Plea are different from those mention'd in the Breach assign'd, yet Judgment was given for the Defendant as to that also.

3. The Demurrer is also to the Plea to the fifth Breach assign'd, which is, that (after the Determination of the Copartnership) the Defendant and the said *Mary* his Wife have not used their Diligence to transfer their Business in the said Copartnership to the Plaintiff and all Customers, &c.

And to that the Defendant saith, that he and his said Wife at any time after the Expiration of the said Copartnership were never requested, or one of them was ever requested to execute the said Premises. And as to that Judgment was given for the Plaintiff.

4. The Demurrer is also to the Plea to the sixth, seventh and eighth Breach, which are all of one and the same Effect, and the first of them is thus assign'd, *viz.* that the said *Mary* within the said four Years, *scil'* such a Day, &c. had taken out of the Plaintiff's Possession diverse Books (naming them) concerning the said Trade, &c. and had refused to deliver them to him on Request, &c.

And as to those three Breaches concerning the taking and detaining of the said Books, the Defendant pleaded, that the Plaintiff from time to time in the Declaration, had and might have had the View and Perusal of the said Books by himself, or by one *Tho. Forster*, Servant of the Plaintiff and the said *Mary*, to that Purpose elected and appointed, without any detaining of them, or any of them, from the Plaintiff by the said *Mary* by the said several Times, or any Space of Time in the Declaration respectively specified,

fo. 878.

cified *modo & forma prout, &c. Et de hoc, &c.* but no *similiter*. And as to that, Judgment was also given for the Plaintiff. And on the Writ of Error no Exception was taken to those two last Judgments.

Note, That by the Articles the Copartnership was to continue for four Years if *Mary Hodges* so long should live; and it is not expressly averr'd that she liv'd so long.

But there are some things in the Declaration which may cure that Defect, especially after Verdict, as for Example in the fourth Breach of Covenant it is alledged, that *Hodges* and *Mary* his Wife after the four Years had worked in the Trade, which is impossible if she died during the four Years.

Claxton versus Swift, in Cam' Scaccar' on a Judgment against Claxton in B. R. in an Action on the Case on a Bill of Exchange.

Int' Hill. 36 & 37 C. 2. B. R. Rot. 1163.

fo. 878. D.
A second Indorsee may maintain an Action against the first, notwithstanding a Recovery against the Drawer.

THE Plaintiff being a Merchant, brought an Action upon a Bill of Exchange; setting forth the Custom of Merchants, &c. and that London and Worcester were ancient Cities, and that there was a Custom among Merchants, That if any Person living in Worcester draw a Bill upon another in London, and if the Bill be accepted and indorsed, the first Indorsor is liable to pay it; That William Hughes drew a Bill of 200 l. on Tho. Pardoe, payable to the Defendant, or Order; which Bill Pardoe accepted, and the Defendant indorsed to one Allen, or Order, who indorsed it to the Plaintiff;

tiff; of which Pardoe had Notice and was required to pay, but refused, per quod the Defendant became liable, &c. Bar, That the Plaintiff in Mich. 34 Car. 2. brought an Action on the Case against the said William Hughes (the Drawer) on the same Bill of Exchange, Taliterq; processum fuit in the same Action; That in Trin. 35 Car. 2. the Plaintiff recover'd 210 l. for Damages, &c. and avers that the Bills of Exchange, &c. are the same. Demurrer, &c.

This Case till the Judgment in B. R. is reported in 3 Mod. Rep. 86. But that Judgment was now revers'd, because there was no Satisfaction; for the Court were of Opinion, that this Case differs from the Case of two Trespassers, and was rather to be compar'd to two Debtors by one joint and several Obligation; for by the Custom the first Drawer of the Bill, and every Indorser thereof, is liable to the Payment of a certain Sum to the last Indorsee, altho' the Action is to recover it by Way of Damages.

fo. 882. D.

Browne versus the Arch Bp. of Canterbury, in a Writ of Error in the Exchequer-Chamber on a Judgment given for the Archbishop against Browne in B. R.

Mich. 35 C. 2. B. R. Rot. 672.

IN an Action of Debt brought by the Archbishop on Bond, with a Condition, which is the same in Effect with the Condition mention'd in the Statute of Distribution of Intestates Estates (the Defendant being bound together with James Browne, Administrator of James Morris.) Bar, That the said James Browne had made a true and perfect Inventory, &c. and that he had truly administered,

fo. 882. D.

A Debtor can't sue the Administration-Bond for Nonpayment of a Debt.

stred, &c. and that he had made a true and just Account, &c. and that the said James Browne had perform'd all the Decrees of the said Court, &c. Replic', That the Intestate was bound in an Obligation of 200 l. to one John Heard. And the Breach of the Condition is assign'd in Nonpayment of that Debt. Demurrer and Joinder in Demurrer.

fo. 884.
Salk. 316.

Judgment was given for the Plaintiff, but the same was afterwards reversed in the *Exchequer-Chamber* by the Opinion of all the Judges, because that the Breach assign'd by the Replication was not within the Intent of the Condition.

*Sir Jonathan Raymond & al' versus
Dr. Barbon.*

Hill. 36 & 37 C. 2. & 1 J. 2. Rot. 339.

884. D.
Where a
Declaration
shall not be
vitiating for
false Latin.

THE Plaintiffs being Sheriffs of London brought an *Action of Debt on a Bond enter'd into by the Defendant to them, and declared de placito quod reddat ei 60 l. quas ei debet &c. pro eo videl' quod cum the Defendant such a Day &c. by his Bond &c. acknowledged himself to be bound to them in the said 60 l. solvend' eidem Vic' cum inde requisit' esset præd' tamen the Defendant had not paid them the said 60 l. sed ill' ei hucusque solvere contradixit &c. ad dampnum ipsius Vic' &c. The Defendant pray'd oyer of the Bond and Condition, and then demurr'd, and the Plaintiffs join'd in Demurrer.*

fo. 885. D.

This Case was in a Writ of Error brought in the *Exchequer-Chamber* on Judgment given for Barbon in B. R. on the Demurrer, for false Latin

Latin in divers parts of the Declaration, which are apparent: But the Judgment was reversed on the Authorities following, viz. 2 Cro. 576. Dame Gargrave's Case, Hob. 70. Lamb versus Wiseman, Co. 5. 121. Long's Case, and Co. 10. 133. a. Osborn's Case, 2 Saun. 38. Carewell and Vaughan's Case, Rolls Amendment 200. and Cro. El. 677. Sir Richard Lewson's Case. On the part of the Defendant in the Writ of Error these Cases were cited, Co. 5. 122. Long's Case, Co. 8. 156. Cro. El. 543. Rolls Amendment 200.

Death *versus* Serwonters in a Writ of Error in the Exchequer-Chamber on a Judgment given against Death in the Action in B. R.

Hill. 36 & 37 C. 2. & 1 J. 2. Rot. 669.

THE Plaintiff declares, That London is an Ancient City, that Usance on Bills of Exchange between Venice and London is Three Months, that there is a Custom for the drawing of Bills of Exchange, and for indorsing, &c. That if the Merchant to whom the Bill was directed made default of Payment to the second Indorsee, then if the second Indorfor pay, &c. to the second Indorsee the Merchant to whom the Bill was directed is liable to pay the second Indorfor. That L. and J. Morelli such a Day, &c. drew a Bill of Exchange on the Defendant for 1000 Ducats, &c. payable ad Usanciam to one Ebertz, which Bill was accepted by the Defendant and indorsed by Ebertz to the Plaintiff, and by him to one Conrad, and by Conrad to Debarry his Agent. That the Defendant

885. D.
Narr' on a
Bill of Ex-
change.

had

had Notice of all the Indorsements, and had not paid Conrad or Debarry, for which Reason the Plaintiff paid Conrad or Order the Money in the Bill, whereupon the Defendant in cons' premis' assumptit, &c. The Defendant pleads a frivolous Plea, to which the Plaintiff demurs, and hath Judgment.

fo. 888. D. Two Errors were mov'd by the Plaintiff's Council.

1. That the Custom was unreasonable; for as this Custom is alledg'd, it may happen that the Def. shou'd be thrice chargeable. *Sed non allocatur*; for by the Indorsement by Ebertz to the Plaintiff he was discharg'd of any Payment to Ebertz, and by the Plaintiff's Indorsement to Conrad he was discharg'd of any Payment to the Plaintiff till the Plaintiff was newly entitl'd to receive the Money of the Defendant by the payment thereof to Conrad; so that at the time of the Action brought against the Defendant no Person but the Plaintiff was entitl'd to any Action against him.

fo. 889.

Another Error was assign'd, That the Plaintiff had not averr'd in the Declaration that the Value was receiv'd by the Drawers of the Bill; *sed non allocatur*; for that doth not lye in his Mouth to say, and it was not material to him whether it was paid to them or not, and therefore the Judgment was affirm'd.

*Margaret Grey Executrix of Ralph Grey
versus Thorowgood and Kath. his Wife,
Administratrix of Ja. Briggs, unadmini-
stred by Roger Briggs and Agnes Briggs,
Executors of the said James Briggs, in a
Writ of Error in Cam' Scaccar' on a
Judgment in B. R. against the said Mar-
garet Grey.*

Trin. 2 J. 2. Rot. 139. B. R.

THE Plaintiffs declare on a Bond of 200 l. fo. 889.
enter'd into by the Testator Ralph Grey to Debt on
the said James Briggs, and produce the Letters of Bond against
Administration granted to the Plaintiff Kath. by an Executrix.
the Vicar General, &c. of the Bishop of Durham. Cro. El. 102.
Plea in Abatement that the said Ralph Grey P. 9. 565. P.
died intestate, and that after his Death, scil. &c. 27.810. Pl. 16.
Administration was committed to her of the Goods Salk. 297. Pl. 8.
of the said Ralph Grey, &c. in which case she 298. Pl. 9.
ought to be named Administratrix, &c. Demur-
rer and Joinder in Demurrer, and a Respond'
Ouster awarded, and Judgment by Nichil
dicit.

The Judgment in B. R. was affirm'd, be- fo. 891.
cause the Defendant had not travers'd that The taking
she had not administred any Goods of Ralph Administra-
Grey before the Letters of Administration tion doth not
were granted to her. *Vide* for that *Pine and* purge a Tor.
Woolland's Case, 2 Ventr. 179, 180.

Fairley

*Fairley versus Roch in a Writ of Error in
Cam' Scaccar' on a Judgment against
Fairley in B. R.*

Mich. 2 J. 2. Rot. 475. B. R.

fo. 891.
Action on
the Case a-
gainst the
Drawer of a
Bill of Ex-
change which
the Plaintiff
had paid *pro*
honore of the
Indorsor of
the said Bill.

TH E Plaintiff being a Merchant brought an Action and declar'd on the Custom of Merchants, viz. that if any Merchant or other Person fecerit aliquam primam & secundam Billam Excambii, and the Merchant to whom such Bills were payable indors'd it, &c. and if the Person on whom 'tis drawn accepts it, and refuses Payment to the Indorsee per quod the Bill is protested, and if any other Merchant *pro honore* of the Indorsor will pay the Money to the Indorsee, then the Drawer of the Bill is chargeable to him who paid *pro honore*, &c. That the Defendant drew two Bills on one James Reilly of 100 l. payable to John Digby who indors'd them to one Lincoln; That the Defendant accepted the first Bill, but did not pay to Lincoln, per quod it was protested. That the Plaintiff paid it to Lincoln *pro honore* of the said Digby the Indorsor *ratione quor' quidem premis'* the Defendant became liable, &c. Judgment for the Plaintiff by Nihil dicit.

892. D.

The Judgment was revers'd, because the Custom, as it was alledged in this Case, was too general; for it is made to extend to all manner of Persons throughout the World. There was another great Fault in the Record, that the Damages put in the Declaration are only 40 l. and the Damages found by the Inquisition are 117 l. and Judgment was given for all the Damages, but that was not insisted on.

Henry

Henry Glover *versus* Benjamin Kendal,
in a Writ of Error in Cam' Scaccar' on a
Judgment given in B. R. against Glover
the Defendant in that Action.

Trin. 2 J. 2. Rot. 627.

THE Plaintiff brings an Action in the Debet fo. 893.
 and Detinet, and declares quod cum he Debt by an
 by the Name of Benjamin Kendall, Executor Executor for
 of Elizabeth Bond, did recover against John an Escape on
 Farrington 600 l. Debt and 2 l. 6 s. for Damages, a Judgment
 &c. whereupon the said Farrington was commit- him.
 ted in Execution in Custody of the Defendant, who
 permitted him to escape. Judgment for the Plaintiff
 by Nichil dicit.

The Judgment was revers'd, by reason the fo. 893. D.
 Action was brought in the Debet and Detinet, Hutt. 78, 79.
 where it ought to be brought in the Detinet
 only ; the Recovery in the first Action being
 as Executor and in the detinet only. 3 Cro.
 326. Hitchcock's Case, Lane 79. Co. 5. 31. Har-
 grave's Case, Savil 130. 2 Cro. 545. Sir George
 Reynels *versus* Lancaster.

*Sir Robert Clarke versus Ambrose Istead,
Administrator of Thomas Manning, in a
Writ of Error in the Exchequer-Cham-
ber on a Judgment for Istead against
Clarke Defendant in B. R.*

Trin. 2 Ja. 2. Rot. 372.

fo. 894.

IN Debt on Bond the Plaintiff declared, that the Defendant Sir Robert Clarke, per nomen J. Clarke per scriptum suum Obligator' &c. Bar by non est Factum, and Issue thereupon. Spec' Verdict, That the Defendant sealed and delivered the Bond in the Declaration, which is found in hæc verba Noverint &c. me Johannem Clarke &c. and that the proper and real Name of the Defendant was Robert Clarke, and not John Clarke. Et si &c. Judgment for the Plaintiff.

! fo. 895. D.
Vide the Case
of Knight &
Ux versus the
Corporation
of Wells, antea
p. 188.

Per tot' Cur' the Judgment was revers'd, and in the Argument of this Case these Cases were cited to maintain the Reversal, Dyer 279. b. Shotbolt's Case, 3 Cro. 897. Field and Winlow's Case, Mo. 897. Panton and Charles's Case, Ow. 48. 2 Cro. 558. Watkins and Oliver's Case, 2 Cro. 640. Maby and Sheppard's Case, 2 Brownlow 48. Sir Edward Ashley's Case. Which are all strong and direct Cases to this Purpose. And note that in the Case of Maby and Sheppard, non est Factum was pleaded, and it was found for the Plaintiff; and yet the Judgment was arrested.

John

John Lewin *versus* Francis Brunetti, in a
Writ of Error in Cam' Scaccar' on a
Judgment in B. R. for Brunetti the Plain-
tiff there.

Trin. 4 Ja. 2. Rot. 185.

NARR' on a Bill drawn by a Merchant of fo. 896.
London on a Merchant of Leghorn, in Case on a
which the Custom is alledg'd, That if any Mer- Bill of Ex-
chant, &c. pro honore of him to whom the Bill change
was first payable, and who had indorsed it to ano- brought by
ther, should pay the Bill to the last Indorsee (the Bill him to whom
being before protested for Nonpayment) then the the Bill was
Merchant to whom the Bill was first payable, and first payable,
who first indorsed it, should have an Action against and who had
that Merchant, who first took upon him by Writing indorsed it a-
to pay the Bill pro honore of the Drawer, the Bill gainst him
being also before protested for Non-acceptance for the who had ta-
Value of the Bill and all Charges, &c. That Abra- ken upon him
ham Euriques Valentin drew four Bills on one to pay it pro
Abendano to pay to the Plaintiff 500 Pieces of honore of the
Eight, who refused to accept the first per quod Drawer, the
it was protested for Non-acceptance, and thereupon Bill being
the Defendant pro honore of the Drawer sub- paid by ano-
scrib'd a Note to pay the Bill on the Return thereof; ther pro hono-
That Valentin by his second Bill requested Aben- re of the
dano to pay the Plaintiff the said 500 Pieces of Plaintiff.
Eight (the first not being paid) who indorsed the
same to Alvarez de Costa, who indorsed it to
Manuel de Vega, who indorsed it to P. and
J. Parenfi, &c. which Bill the Plaintiff shew'd
Abendano, &c. and required him to pay it accord-
ing to the Indorsement, which he refused, per quod
it was protested for Nonpayment; whereupon Peter
Antonio Brunetti and L. A. Brunetti paid it,

B b 2

&c.

&c. pro honore of the Plaintiff, of which the Defendant had Notice and saw the Bill, it being return'd & in cons' premis' promised to pay the 500 Pieces of Eight, and all Charges, &c. but nevertheless had not paid the 500 Pieces of Eight, or the Value, being 172 l. or 10 l. the Charges, &c. Averment, that the third or fourth was not paid by Abendano. Bar by non Assumpsit, and Issue thereupon. Verdict and Judgment for the Plaintiff.

fo. 899.
In what
Case a bad
Declaration
shall be made
good by the
Verdict.

fo. 899. D.

The Error which was insisted on upon the Writ of Error was, that in the Declaration it was alledg'd that the Bill was paid by *Petro Antonio Brunetti* and *Lucas Antonio Brunetti* for the Honour of the Plaintiff. But that it was not alledg'd to whom the 500 Pieces of Eight were paid; whereas it ought to have been precisely alledg'd that they were paid to *Argus* the last Indorsee: For the Custom is alledg'd to be, that if any Person or Persons pay the Bill to the last Indorsee for the Honour of him to whom the Bill was first payable, and who first indorsed the Bill, that then he who took upon him to pay the Bill for the Honour of the Drawer, is liable to pay to the first Indorser to whom the Bill was first payable; and the Declaration ought strictly to pursue the Custom, which is the Foundation of the Action. But after several Arguments the Judgment was affirm'd; *Pollexfen* Chief Justice *hesitante*. And the Reason was, because it was after Verdict which had found the *Assumpsit*, which could not have been without Proof that the Money was duly paid, and therefore it should be intended that it was paid where it was due, viz. to *Argus* the last Indorsee; *Ex relatione servientis Girdler*,

ler, who was of Council with the Defendant in the Writ of Error.

I can't discover that any Exception was taken to the Validity of the Custom, which in brief is such, *viz.*

That if any Merchant, &c. (*pro honore* of him to whom a foreign Bill of Exchange was at first payable, and who first indorsed the Bill to another) shall pay the said Bill to the last Indorsee thereof, the Bill being before protested for Nonpayment, then the Merchant to whom the Bill was at first payable, and who first indorsed the Bill, shall have an Action against that Merchant, who had before taken upon him by Writing to pay the Bill, &c. for the Honour of the Drawer, the Bill being also before protested for Non-acceptance for the Value of the Bill and all Charges, &c.

Haugh versus Roe & al' Executors of John Roe, in a Writ of Error in Cam' Scaccar' on a Judgment in B. R. against Haugh.

Mich. 5 W. & M. Rot. 248. B. R.

THE Plaintiffs, as Executors of J. R. declare, fo. 399. D.
That one Nicholas Lambert drew a Bill of Exchange of 42 l. 15 s. on the Defendant, which he accepted, &c. And that the Defendant afterwards in consideration that the Testator would accept him for his Debtor for the said 42 l. 15 s. to him due from Lambrechts in vice & loco ejusdem Lambrecht promised to pay the Testator the said 42 l. 15 s. &c.

B b 3

The

fo 900. D.
Hutt. 46. Cro.
C. 70, 241. I
Sid. 369. I Ven.
152.

fo. 901.

The Defendant pleaded *non Assumpsit*, and Verdict and Judgment was for the Plaintiff; and thereupon a Writ of Error was brought in the *Exchequer-Chamber*, and the Judgment was affirm'd by the Opinion of the *Treby* Chief Justice, *Nevil* Justice, Baron *Lechmere*, and *Powis* Justice, against the Opinion of the Chief Baron *Ward*, Justice *Powel*, and Justice *Blencow*. But on what Reasons or Authorities their Opinions were founded I am not inform'd; but as it seemeth the Cases following are to the Purpose of this Case, viz. *Forth* and *Stanton's* Case, 1 *Saun.* 210. and 1 *Lev.* 262. Case and *Barber's* Case. *Raymond* 450. *Clipson* and *Morrice's*, 1 *Sid.* 396. and 1 *Ventr.* 9. *Potter* and *Turnour's* Case, *Palmer* 185. *Reynolds* and *Prosser's* Case, *Hardres* 71. *Woodward* and *Rigbie's* Case, 2 *Jones* 87. *Prideaux* and *Rawlins's* Case, 2 *Jones* 125. *Oble* and *Dittlesfield's* Case, 1 *Ventr.* 153. *Russel* and *Haddock's* Case, 1 *Lev.* 188. and 1 *Sid.* 294. *Newcomen* and *Leigh's* Case, *Stiles* 249. which Case is entred *Pasch.* 1650. *Rot.* 62. and not 52. as is said in *Stiles*. And note that in the said Case of *Newcomen* and *Leigh* it appears by the Record it self, that the Words (*in the Room of one Cooper*) are not in the Record, as they are said to be in *Stiles*; and no Judgment is enter'd on the Roll of the said Case, which was in a Writ of Error on a Judgment in an inferiour Court, as I am inform'd by Mr. *Lindley*, who was Attorney for the Defendant in the said Case of *Haugh* against *Roe*, and who had seen the Record of that Case of *Newcomen* and *Leigh*.

Bishop

*Bishop of Exon and Thomas Heskett Clerk
versus Thomas Freake & al' in a Writ
of Error on Judgment given at the As-
sises in a Writ of Quare impedit.*

Pasch. 11 W. 3. Rot. 334. B. R.

Hill. 10, 11 W. 3. Rot. 1337. C. B.

THE Plaintiffs bring a Quare impedit a-
gainst the Bishop and Incumbent, and count
that Elizabeth Cabel was seised in Fee of the
Rectory of Buckfastleigh, to which the Vicaridge
belongs, and presented Sainthill, &c. to the said
Vicaridge, and afterward by Lease and Release con-
vey'd the Rectory to the Plaintiffs in Fee to the Use
of herself and her Heirs till a Marriage had between
her and one Doyly, and after to the Use of the
Plaintiffs for 500 Years; That the said Marriage
was had, whereby they were possessed, &c. and that
the Vicaridge became void by the Death of the said
Sainthill. Bar by the Incumbent that Jac. 1. was
seised in Fee, &c. of the said Rectory, and that the
Vicaridge became void by the Death of one Lang-
ston, and the King presented Solbear, &c. and
that the Rectory descended to K. Jac. 2. And that
it came to K. William and Q. Mary, and that
she died, &c. and then he traverseth the Seisin in
Fee of the said E. C. and Issue thereupon, and Ver-
dict for the Plaintiffs. The Jury found these Points,
That the Vicaridge was full ex Presentatione
W. 3. That incepit vacare 25 Dec. 1697. That
the Plaintiffs brought their Original 20 May, 10
W. 3. And that valet per Ann' 60 l. And im-
mediately thereupon the Plaintiffs pray'd Judgment
according to the Statute, and a Writ to the Bishop

fo. 901.

and their Damages ; whereupon Judgment was given quod recuperent presentation' &c. & dampna ad valorem Ecclesiæ per dimid' unius Anni. Et quod habeant breve Episcopo &c.

fo. 905.

I don't find in any Book of Entries an entire and compleat Record in a *Quare impedit*, in which Judgment is given by the Justices of Assize, or any Precedent of a Judgment only given by the Justices of Assize, except three, viz. in Townesend's Second Book of Judgments 189. two Precedents, and one in Ashton's Entries 449 and 450. But there is some small Difference between the said Entries and the Entry of the Judgment in this Case ; for in the said Precedents it is said, that the Plaintiff after the Verdict, *Ad dictas Assizas pet' Judicium &c. Ideo cons' est per prefat' Justiciar' ad Assizas &c.* But in this Case no express mention is made that the Plaintiffs *ad dict' Assizas petier' Judic'* or that the Judgment was given *per prefat' Justiciar' ad Assizas*. But in this Case after the Verdict it is said thus ; *super quo iidem Edwardus &c. Instant' petier' Judic' &c. ideo Cons' est per Cur' hic &c.* And so as it seems the Variance is only in Words, and not in Substance ; for it can't be intended but that all was done at the same time.

Note, That in the said Precedent in Ashton there was a Judgment against the Bishop, and one other of the Defendants in the Action, with a *Cessat Executio quousq; &c.* and the Tryal was between the Plaintiff and a third Defendant, and yet in the Judgment at the Assizes there is a Writ awarded to the Bishop *non obstante Reclamatione præd' Episcopi & Hugonis*.

The Plaintiff in the Writ of Error in this Case was nonsuited.

Thurstan

Thurstan versus Slatford in a Writ of Error on a Judgment in C. B. after Tryal at Bar and a Bill of Exceptions to the Evidence.

Hill. 11 W. 3. Rot. 559. B. R.

Pasch. 11 W. 3. Rot. 548. C. B.

Assumpsit for Money received to the Use of the Plaintiff; on non Assumpsit pleaded, and Issue thereupon on the Tryal thereof at the Bar of C. B. The Plaintiff gave in Evidence, That he was admitted and sworn into the Office of Town-Clerk of Oxford, 29 April 1697. and that he had done every thing by the Statute required to be performed to that Time, and that afterwards and before the Original the Defendant had received 5 l. of the Fees and Profits of the said Office. And then the Records of the Sessions of Peace held the 3d of May next following, and the Record of a Session, &c. held by Adjournment was produc'd to prove that the Plaintiff had taken the Oath and subscribed the Declaration and the Association. And Exception was taken to the Evidence, that the said Records were not sufficient to prove the Matters aforesaid, which was over-rul'd by the Court, and thereupon Verdict and Judgment was given for the Plaintiff. Upon this the Defendant brings a Writ of Error, in which the Evidence and the Exception aforesaid is inserted. fo. 905. D.

The Case was once argued by Council on both sides, and much was said to prove that the Records abovemention'd were not sufficient to prove that the Plaintiff at the next Sessions, &c. after his Admission into the said fo. 910. Salk. 287, 428.

said Office had taken the Oaths of Supremacy and Allegiance, &c. according to the Statute 25 C. 2. cap. 2. But the Court said nothing to the Matters urg'd by the Council, for the Chief Justice observ'd a Defect in the Bill of Exceptions, which prevented the taking of them into Consideration; which was, that it did not appear in the Case but that the Profits of the Office, charg'd to be receiv'd by the Defendant, and for which the Verdict is given, were receiv'd by the Defendant after the Admission of the Plaintiff into the Office, and before the next Sessions: And if it was so, altho' it should be admitted that the Plaintiff had not taken the Oaths, or otherwise qualified himself according to the Statutes, so that by this Default his Office became *ipso facto* void for the Time to come; yet that doth not prove but that he was a compleat Officer for all the Time after his Admission and before Default, &c. and had Right to all the Perquisites of the Office, and well capable to demand Satisfaction against any who during that Time usurp'd upon him; and on that Reason only the Judgment was affirm'd, as I heard *ex relatione* of the Council of the Plaintiff in the Writ of Error. But yet I will make a short Report of what was said for the Plaintiff in the Writ of Error.

fo. 911.

And first it was said, that it could not be pretended that *Slatford* had taken the Oaths, &c. at the first Sessions held 3 *Maii*, 9 *W.* for the Record of that Session only makes mention of a Register of the Names of those who produc'd Certificates and had taken the Oaths, &c. but the Name of *Job Slatford* is not inserted in that Record.

And

And the Sessions held 2 *Julii* can't be taken to be an Adjournment of the Sessions held the 3d of *Maii*, for these Reasons.

1. Because the Sessions held the 3 *Maii* is thus stiled, *scil' Ad General' Quarterial' Session' Pacis Dom' Reg' tent' apud Oxon' &c.* And the Sessions held 2 *Julii* is thus stiled, *scil' Ad General' Session' Pacis &c. tent' per Adjournament' à presat' die Jovis prox' post festum sanctæ Trin' usque secundum diem Julii apud Oxon' præd' in Com' præd' secundo die Julii* (no Year being named) so that there is a great Difference between them; for altho' every General Quarter Sessions is *General' Sessio Pacis*, yet every General Sessions is not a General Quarter Sessions.

2. Because the first Sessions was before the Justices of the Peace and of Oyer and *Terminer*, and the second was before the Justices of the Peace only; and so they differ in that Respect.

3. Because the Record of the first Sessions saith, that the said Sessions was held *die Jovis tertio Maii*, without making any mention that it was held *die Jovis* after any Feast. But the Record of the second Sessions saith, that it was held by Adjournment *à presato die Jovis prox' post Festum sanctæ Trin.* Which having a Retrospect to another distinct Record ought to be taken together, and no Part thereof can be rejected, which may be where in one and the same Record a Day certain is fix'd; and after mention is made of the Day before said, with an additional Variance from the first Part of the Record, there the first Part may stand and the Misprision may be rejected; and then that is another Variance between the two Records.

4. Be-

4. Because it doth not appear to what 2d Day of *July* the Adjournment was made, nor on what 2d Day of *July* the second Sessions was held, *scil'* the 2d Day of *July*, 9 *W.* or in any other Year; and if it was in any other Year, then it was void; for an adjourn'd Sessions can't invade or run into another subsequent Sessions.

fo. 912. *Nota*, That the Record of the second Sessions of Peace is such: *Registrum nomin' eor' qui personaliter comperuer' &c. Et ibidem in Cur' deliberaver' Certification' &c. Et ibidem immediate post deliberat' &c. in publica & aperta Cur' inter horas &c. [subscripser'] secundum form' Statut' prædict' sepeal' Sacramenta specificat' in quodam Actu &c. edit' & stabilit' [pro] eodem tempore præstation' Furament' præd' sepealiter fecer' & subscripser' Declaration' infra script'* So that the Word *subscripser'* is inserted instead of *fecerunt*, and the Word *pro* is inserted instead of the Word *et*, whereby the Record is altogether imperfect, as well to the Subscription of the Declaration as to the taking of the Oaths; and on the Examination of the Record it self in *B. R.* it appear'd to be so.



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